LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 22 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 20

W.M.C.A. INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Plaintiffs-Appellants,

against

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES SECRETARY OF STATE AND ATTORNEY GENERAL

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney pro se and for
Appellee Secretary of State
80 Centre Street
New York 13, New York

IRVING GALT
Assistant Solicitor General

SHELDON KAAB
Assistant Attorney General

BARRY MAHONEY
Deputy Assistant Attorney General

of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Statutes Involved	1
Questions Presented	4
Statement of the Case	5
A. The Pleadings	5
B. Prior Proceedings	7
C. The District Court Hearing	7
D. Opinions Below	10
ARGUMENT	12
Introduction and Summary	12
I. New York's formula for apportioning its Legislature is entirely consistent with the Fourteenth Amendment	23
A. The standard under the Fourteenth Amendment	24
1. The lesson of *Baker* v. *Carr*: Governments must be responsive to the popular will	24
2. The role of per capita representation	30
3. The role of other devices for assuring that Government rests on a consensus of the governed	32
4. The role of familiar standards under the equal protection clause	35
B. New York's formula is constitutional	36
1. Burden of proof	36
2. The New York formula provides for representation which is responsive to the popular will and at the same time prevents domination of the State by any one locality	38

PAGE

3. Even if the Constitution required substantial adherence to per capita representation, the New York formula would satisfy such a test 50

4. The New York formula does not result in any arbitrary distinctions or invidious discrimination 55

II. This case presents no occasion for the intervention of federal equity power 58

A. The lack of standards for a Court-imposed formula 59

B. The lack of compelling circumstances to justify a Court-imposed formula 63

III. The District Court properly rejected appellants' offers of proof 65

A. The offer to prove "intentional" discrimination 66

B. The offer to prove that the Legislature has "discriminated" against urban areas 67

C. The offer to prove that most "experts, agree with appellants' legal theories 69

Conclusion 70

CASES

Baker v. Carr, 369 U. S. 186 (1962) 7, 13, 22, 24, 27, 29, 30, 35, 37, 38, 55, 59, 62, 68, 69

Blaikie v. Power, 13 N. Y. 2d 134, —— N. E. 2d —— (1963) 32

Caesar v. Williams, 371 P. 2d 271 (Idaho 1962) 35

Carmichael v. Southern Coal Co., 301 U. S. 495 (1937) 68

Clark v. Uebersee Finanz-Korp., 332 U. S. 480 (1947) 69

PAGE

Colegrove v. Green, 328 U. S. 549 (1946) 62, 63

Davis v. Schnell, 81 F. Supp. 872 (S. D. Ala.), *aff'd* 336 U. S. 933 (1949) 67

Davis v. Synhorst, 217 F. Supp. 492 (S. D. Iowa 1963) 68

Everson v. Board of Education, 330 U. S. 1 (1947) .. 68

Ferguson v. Skrupa, 372 U. S. 726 (1963) 27

General American Tank Car Corp. v. Day, 270 U. S. 367 (1926) 68

Gray v. Sanders, 371 U. S. 368 (1963) 14, 24, 26

Jackman v. Bodine, 78 N. J. Super. 414, 188 A. 2d 642 (1963) 35

Ker v. California, 374 U. S. 23 (1963) 29

Kotch v. Board of Pilot Comm'rs, 330 U. S. 552 (1947) 67

Lassiter v. Northampton Co. Bd. of Elections, 360 U. S. 45 (1959) 67

MacDougall v. Green, 335 U. S. 281 (1948) 15, 25, 33, 34

Mann v. Davis, 213 F. Supp. 577 (E. D. Va. 1962), *prob. jurisd. noted*, 374 U. S. 803 (1963), No. 69, Oct. T. 1963 ..... 31, 36, 38

Maryland Comm. for Fair Representation v. Tawes, 229 Md. 406, 184 A. 2d 715 (1962), *prob. jurisd. noted*, 374 U. S. 804 (1963), No. 29, Oct. T. 1963 31

Matter of Fay, 291 N. Y. 198, 52 N. E. 2d 97 (1943) .. 45

McGowan v. Maryland, 366 U. S. 420 (1961) 37, 67

Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580 (1935) 37

Morey v. Doud, 354 U. S. 457 (1957) 16, 36, 45

PAGE

Sims v. Frink, 208 F. Supp. 431 (M. D. Ala. 1962), *prob. jurisd. noted*, 374 U. S. 802 (1963), No. 23, Oct. T. 1963 31

United States v. Carolene Products, 304 U. S. 144 (1938) 14, 29, 38

United States v. Classic, 313 U. S. 299 (1941) 68

United States v. Des Moines Ry., 142 U. S. 510 (1892) 66

United States v. Saylor, 322 U. S. 385 (1944) 68

CONSTITUTIONS AND STATUTES

Constitution of the United States:

Art. I, § 2 34
Art. I, § 3 34

New York State Constitutions:

Constitution of 1777 40
§ IV 40
§ V 40
§ X 40
§ XI 40
§ XII 40

Constitution of 1821 41
Art. I, § 2 41
Art. I, § 5 41
Art. I, § 7 41

Constitution of 1846 41
Art. III, § 2 41
Art. III, § 3 41
Art. III, § 4 41
Art. III, § 5 41

PAGE

Constitution of 1894
Art. III, § 2 ..... 2, 5
Art. III, § 3 ..... 2, 5
Art. III, § 4 ..... 2, 5
Art. III, § 5 ..... 2, 5
Art. IX, § 9 42
Art. XIX, § 2 49

New York State Statutes:

Conservation Law:
§ 205 42
§ 879 42

Correction Law:
§ 14-a 42

County Law:
Art. 6-A 43
§ 219 42
§ 299-w 42
§ 301-309 42

State Defense Emergency Act 42

Education Law:
§ 1104 42
§ 1113 42
§ 4403 42
§ 6301 42
§ 6302 42
§ 6304 42

Highway Law:
§ 12 42
§ 112 42
§ 112-a 42
§ 279 42

PAGE

Mental Hygiene Law:
Art. 8-a 42
§ 191-a 42

Public Health Law:
§ 608 42
§ 620 42
§ 636 42
§ 650 42
§ 660 42

Social Welfare Law:
§ 65-73 42
§ 74-75a 42
§ 153 42
§ 154 42
§ 257 42
§ 409 42

State Law:
§ 120 4
§ 121 ..... 4, 5
§ 122 4
§ 123 ..... 4, 5
§ 124 4

MISCELLANEOUS

Amicus Brief for the United States, *Baker* v. *Carr*. 47

Bickel, *Reapportionment and Liberal Myths*, 6 Commentary 483 (1963) 70

David and Eisenberg, Devaluation of the Urban and Suburban Vote (1961) 32, 51, 52, 63

DeGrazia, Essay on Apportionment and Representative Government (1963) 67, 68, 70

PAGE

Dixon, *Apportionment Standards and Judicial Power*, 38 Notre Dam Law. 367 (1963) 31, 54, 70

Drake, *History of the County Law*, Introduction to (McKinney's) N. Y. County Law (1950) 40

Goldberg, *The Statistics of Malapportionment*, 72 Yale L. J. 90 (1962) 31

Israel, *On Charting a Course Through the Mathematical Quagmire*, 61 Mich L. Rev. 107 (1962) 34, 70

Lewis, *Legislative Apportionment*, 71 Harv. L. Rev. 1057 (1958) 43

Lincoln, The Constitutional History of New York, vols. 1 (1905) and 3 (1906) 39, 40

Lucas, *Legislative Apportionment and Representative Government*, 61 Mich. L. Rev. 711 (1963) 29, 70

McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54 (1962) 27, 28, 70

Munger and Straetz, New York Politics (1960) 46, 53, 65

National Municipal League, Compendium on Legislative Apportionment (2d ed. 1962) 31, 51

Neal, *Baker* v. *Carr: Politics in Search of Law*, 1962 Sup. Ct. Rev. 252 (1962) 29, 34, 70

Note, 72 Yale L. J. 968 (1963) 36, 65

1962-63 N. Y. Legis. Man. 49, 54

1961-62 N. Y. Legis. Man. 54

1959 N. Y. Legis. Man. 54

1957 N. Y. Legis. Man. 54

1956 N. Y. Legis. Man. 54

PAGE

The New York Times:
Sept. 7, 1957 50
Sept. 24, 1957 50
Oct. 29, 1957 50

Revised Record of the Constitutional Convention of 1894 (1900) 43, 45, 46, 47, 48

Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581 (1962) 3

Silva, *Apportionment of the New York Assembly*, 31 Fordham L. Rev. 1 (1962) 4

Sindler, *Baker* v. *Carr: How to 'Sear the Conscience'' of Legislators*, 72 Yale L. J. 23 (1962) 70

United States Advisory Comm. on Intergovernmental Relations, Apportionment of State Legislatures (Report A-15) (1962) 46, 56

Supreme Court of the United States

OCTOBER TERM, 1963

No. 20

W.M.C.A. INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. MCCAFFERTY,

Plaintiffs-Appellants,

against

JOHN P. LOMENZO, Secretary of State of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, PAUL R. SCREVANE, President of the City Council of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES SECRETARY OF STATE AND ATTORNEY GENERAL

Statute Involved

The relevant state constitutional and statutory provisions are set forth in Appendix A of appellants' brief. We summarize them here briefly for the convenience of the Court.

The system for apportioning seats, in both the State Senate and Assembly, is contained in N. Y. Const. Art. III, §§ 2-5. While more than one Senate or Assembly District can be contained within the whole of a single county, and while a given Senate district may consist of more than one county, no county border line can be broken in the formation of either type of district.

The Senate districts are created primarily on the basis of citizen population. The Constitution provides that each district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as practicable. A "ratio" is determined by dividing the citizen population of the State by 50 (the minimum number of Senators); Senate districts are then formed by combining or dividing counties so that each district contains approximately this number (the "ratio") of citizens, subject to four further provisos: (1) when any county entitled to more than three Senators becomes entitled to more Senators than it had in 1894, when the apportionment formula was adopted, the Senate is enlarged from its minimum size (50) by the number of these additional Senators; (2) no county can have four or more Senators unless it has a full population ratio for each; (3) no county shall have more than one third of all the Senators; and (4) no two counties that are adjoining or separated by a public waterway shall have more than half of all the Senators. (The last two of these provisos are inoperative, since no counties are entitled to that number of Senators.)

In order to implement these rules mechanically, the Legislature first apportions Senate seats to the most populous counties and then distributes the remainder of the seats to the other counties. Thus, it begins by assigning seats to counties which contain a citizen population equal to or greater than three full ratios, *i.e.*, six percent of the total citizen population of the State. Each such county is entitled to one seat for every full ratio. Next, it

calculates the total size of the Senate by determining the increase in representation since 1894 for each such county, and adding the total increase to the minimum number of 50 Senators. Then, it apportions the remaining seats among the counties according to their population. See Silva, *Apportionment in New York*, 30 Fordham L. Rev. 581, 627 (1962).

The total number of Assemblymen is fixed at 150, with every county except Hamilton (which shares one Assemblyman with Fulton County) entitled to one Assemblyman. Sixty-one seats are thus accounted for. The remaining 89 seats, however, are apportioned in this manner: The citizen population of the State is divided by the total number of Assemblymen (150), and the quotient thus achieved becomes the "ratio". Every county whose citizen population equals 1½ times the "ratio" is entitled to a second Assemblyman. The rest of the seats are then apportioned among those counties with citizen populations greater than twice the "ratio". Seats apportioned on remainders are apportioned in the order of highest remainders, with the proviso that no county shall have more Assemblymen than a county with a larger citizen population.

The mechanical implementation of the Assembly apportionment rules, unlike the Senate apportionment rules, requires that seats first be apportioned to the least populous counties. First, one seat is apportioned to each county with less than 1½ ratios and two seats are apportioned to every other county in the state. Next, two ratios are deducted from the citizen population of each county having at least that number of citizens, and the results thus obtained are added. The sum is divided by the number of undistributed seats, and the quotient is then used as a basis for apportioning seats to these counties. The citizen population of each of these counties, less two ratios, is divided by the quotient previously obtained, and each such county receives a number of seats equal to the

new quotient. The remaining seats are distributed in order of highest remainders. See Silva, *Apportionment of the New York Assembly*, 31 Fordham L. Rev. 1, 24, 28 (1962).

The most recent redistricting pursuant to these provisions went into effect in 1954. See New York State Law §§ 120-24.

Questions Presented

1. Does the Constitution require that both houses of a state legislature be apportioned according to a strict population standard without regard to any other factors?

2. Does the Constitution require that one house of a state legislature be apportioned according to a strict population standard whenever the other house is apportioned according to a standard combining population with a guarantee of at least one representative per county?

3. Even if the Constitution requires substantial adherence to per capita representation in a bicameral legislature, does it prohibit a guarantee of at least one representative per county in one house and a rule in the other house providing that (a) representatives apportioned to the most populous counties must be apportioned only on a full ratio and that (b) increased representation of the most populous counties shall result in an increase in the size of the entire membership so as not to diminish the aggregate representation of the other counties?

4. Should a federal court of equity impose a strict rule of per capita representation on a state which, pursuant to its own constitution, has apportioned seats in its legislature according to a standard combining population with other factors in an effort to assure that all citizens have an equal voice in government?

5. Did the District Court err in excluding evidence that (1) the New York apportionment formula was "intended" to discriminate against urban residents, (2) the Legislature has "discriminated" against urban areas and (3) most "experts" agree with appellants' legal theories?

Statement of the Case

A. The Pleadings.

Appellants brought this action seeking a declaration that New York Const. Art. III, §§ 2-5, and its implementing statutes, State Law §§ 121, 123, violate the Fourteenth Amendment of the Constitution of the United States and an order enjoining defendants from enforcing or executing these provisions (R. 11-12). Appellants named as defendants various state and local officials who they alleged were under a duty to administer and enforce the statute (R. 3-4). These officials included the Attorney General and Secretary of State* of New York, on whose behalf this brief is filed.

Appellant W.M.C.A., Inc. alleged that it is a New York corporation having its principal place of business in New York County (R. 2), and the six individual appellants alleged that they are taxpayers and voters in four of New York City's counties (Bronx, Kings, New York, Queens; the fifth county, Richmond, is not represented) and in neighboring Nassau and Suffolk Counties (R. 2). They claim that the challenged provisions of the State Constitution violate the Fourteenth Amendment "because the apportionment formula contained therein results, and must

---

* When this action was begun, Caroline K. Simon was Secretary of State of the State of New York and was named as a party defendant. After this appeal was taken, John P. Lomenzo became Secretary of State and, accordingly, we have revised the title of this action to indicate that fact. See Rule 48, Revised Rules of the Supreme Court of the United States.

necessarily result * * * in a grossly unfair weighting of both houses in the State Legislature in favor of the lesser populated rural areas of the state to the great disadvantage of the densely populated urban centers of the state" (R. 6). In particular, they complain of the rules for apportioning the Senate which provide that any county with more than three Senators may obtain additional Senators only on a full ratio and that the total number of Senators is increased by any increment in the representation of the more populous counties over that of 1894 (R. 6). They also complain of the rule which guarantees at least one Assemblyman to each county (except Hamilton, which is joined with Fulton) (R. 6). They allege that these provisions were invalid at the time of their adoption in 1894 and that failure to revise them in light of "shifts of population to urban areas" have "aggravated" the violation of their rights (R. 10-11). They also charge that as a result of "malapportionment," the Legislature has "unjustly" allocated taxes and revenues, and that they have been subjected to "taxation without adequate representation" (R. 9). Finally, they allege that "the legislature is controlled and dominated by persons elected by a minority of citizens who may be expected to preserve the status quo which perpetuates their domination" (R. 10) and that, unless a judicial decree were forthcoming, the present constitutional provisions could not be amended prior to the then-forthcoming 1962 elections either by the Legislature or by a constitutional convention (R. 10).

The state officials named as defendants answered the complaint* denying all its material allegations, except those

---

* The pleadings herein referred to were filed after this Court remanded the case to the District Court. When the action was first begun, all the defendants, except those represented by the Corporation Counsel of the City of New York, moved to dismiss the complaint. The County Executive of Nassau County, who had joined in the motions to dismiss, was replaced before the remand by a new County Executive who espoused appellants' position (R. 116-17).

relating to the actual provisions of the state constitution and statutes and to various statistical items such as figures for citizen population and representation in the Legislature (R. 120-22). They also asserted several affirmative defenses, including (1) the right of the People to amend the state constitution by convention, without the approval of the Legislature, (2) the refusal of the People to alter the present apportionment formula, (3) lack of equity and (4) lack of standing in the corporate plaintiff (R. 119-20).

The local officials represented by the Corporation Counsel of the City of New York and the County Attorney of Nassau County admitted the allegations of the complaint and joined in the prayer for relief (R. 87-88, 116-17). All the other defendants filed general denials and asked for dismissal of the complaint (R. 117-18, 123-24).

B. Prior Proceedings.

The three-judge District Court, prior to this Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), had unanimously granted appellees' motions to dismiss the complaint (R. 88-114). 202 F. Supp. 741 (1962). On appeal, this Court held that the "well-established practice of a remand for consideration in the light of a subsequent decision" applied. 370 U. S. 190, 191 (1962). It therefore vacated the judgment of the District Court and remanded the case for reconsideration in light of the *Baker* decision, noting that "the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination." *Ibid.*

C. The District Court Hearing.

On remand, the District Court ordered appellees to answer or otherwise move with respect to the complaint by July 30th, and set the case down for hearing on August 1, 1962 (R. 114-15).

At the hearing, appellants introduced various statistical tables (Pl. Exhs. 1-7, R. 180, 243-49) showing the arithmetic application of the apportionment formula, and both sides introduced a stipulation (R. 164, 226-42) containing population statistics and the result of past, current and projected apportionments. The tables and stipulation were admitted into evidence.

Appellants and the parties aligned with them also offered to present evidence as to three other matters. First, they offered to show that each rule limiting the representation of New York City was "intentionally devised" to do that (R. 143). The Court rejected this offer on the ground that the motivation of the constitutional convention was irrelevant (R. 145). Second, they offered to show that appellants suffered "actual injury" under the "challenged malapportionment system" from "discriminat[ory]" legislation (R. 142, 147). This offer, too, was excluded (R. 148). Third, they offered to produce "expert" testimony as to whether the present apportionment was "fair and equitable" (R. 129). The Court held that it is for the Courts, not the witnesses, to determine the legality of an apportionment and rejected the offer (R. 129).

The salient statistics revealed by appellants' exhibits, the parties' stipulation and the census report appended to appellants' complaint (R. 32-86) summarize the results of New York's apportionment. They show that:

1. According to the 1960 census, the six counties represented by the six individual plaintiffs had a citizen population of 9,129,780, or 56.2% of the State's total citizen population of 16,246,786 (R. 227-29, 234). They are represented by 72 Assemblymen and 28 Senators—48.0% of the Assembly and 48.3% of the Senate (R. 227-29). When the Legislature reapportions the State on the basis of the 1960 census figures, these same counties will have 26 Senate seats and 69 Assembly seats, 45.6% and 46.0%, respectively, of the two houses (R. 234, 237).

2. The ten most heavily populated counties in the State (Kings, Queens, New York, Bronx, Nassau, Erie, Westchester, Suffolk, Monroe and Onondaga) have under the current apportionment 38 Senate seats, 65.5% of all the Senate, and 93 Assembly seats, 62.0% of all the Assembly (R. 227-29); when the Legislature reapportions New York on the basis of the 1960 census figures, these same counties will have 37 Senate seats and 92 Assembly seats, 64.9% and 61.3%, respectively, of the two houses (R. 234, 237). They have a citizen population of 11,937,406—73.5% of the total citizen population of the State (R. 234). Each of these counties is at least 72% urban, and most are over 90% urban (R. 61).

3. The five counties making up New York City have, under the current apportionment, 25 Senate seats, 43.1% of all the Senate, and 65 Assembly seats, 43.3% of all the Assembly (R. 227); when the Legislature reapportions New York on the basis of the 1960 census figures, these same counties will have 21 Senate seats and 56 Assembly seats (R. 234, 239), 36.8% and 37.3%, respectively, of the two houses. They have a citizen population of 7,420,631, or 45.7% of the total citizen population of the State.

4. The nine counties comprising the New York City standard metropolitan statistical area* (New York City plus Nassau, Rockland, Suffolk and Westchester Counties) (R. 75) had, according to the 1960 census, a citizen population of 10,260,557, or 63.2% of the total citizen population of the State (R. 227). They are represented by 81 Assemblymen and 32 Senators—54.0% of the Assembly and 55.2% of the Senate (R. 227). When the Legislature reapportions New York on the basis of the 1960

---

* A standard metropolitan statistical area consists of the central city and contiguous counties which "are essentially metropolitan in character and are socially and economically integrated with the central city" (R. 42).

census figures, these same counties will have 78 Assembly seats and 30 Senate seats—52.0% and 52.6%, respectively, of the two houses (R. 237, 239-40).*

Since the validity of various other comparisons—such as ratios of "underrepresentation"—are disputed, we reserve them for the argument section of the brief.

D. Opinions Below.

After considering the evidence, the three-judge District Court unanimously dismissed the complaint on the merits, holding that appellants failed to meet the burden of showing invidious discrimination. 208 F. Supp. 368 (1962).

Judge LEVET wrote the principal opinion of the Court (R. 295-319). He first pointed out that New York's apportionment formula is far from arbitrary or irrational. New York gives primary weight to population in both houses of the legislature. It departs from a strict population standard only in that (1) it guarantees each county at least one assemblyman (as does the federal formula for apportioning members of the House of Representatives to the states), (2) it provides that densely populated counties, already having three or more senators, may gain an additional senator only on each full ratio, and (3) it provides that such additional senators are added to the total membership of the Senate so that they need not be taken from the less densely populated counties (R. 305-07). Second, Judge LEVET noted the historic significance and importance of county government in New York and the

---

* The figures for the reapportionment under the 1960 census have been obtained without crediting Rockland County with a Senator. Under the existing apportionment, Rockland and Orange together form one Senate District, and Rockland, with a citizen population of 131,834 according to the 1960 census, will surely be part of a multi-county district under the reapportionment. Richmond County, which has a Senator of its own under the existing apportionment, will undoubtedly get one again under the reapportionment—its 1960 citizen population is 216,764.

emphasis in past apportionment formulas on preserving county representation in the legislature (R. 307-311). He concluded that the present formula is "fitted to the nature of the governmental development of the Empire State" (R. 311). Third, he emphasized that a majority of the people had refused to change this formula. In fact, they refused to convene a constitutional convention—in which the urban majority would have been in overwhelming control—despite the fact that advocates of a new apportionment system, including the then-governor of the State, urged them to do so (R. 312). Fourth, Judge LEVET pointed out that the ten most populous counties in the State control both houses of the Legislature; and he warned that senate and assembly districts, already oversized in the sparsely populated areas, would grow so large that there would be virtually no contact between legislator and constituent unless a strict population standard could be tempered by geographical considerations (R. 312-13). Finally, he noted that a court should be especially conscious of traditional presumptions of constitutionality when it is dealing with basic provisions of a state constitution (R. 314). He concluded, in light of these observations, that New York's legislative apportionment is free from constitutional taint (R. 314). Judges RYAN and WATERMAN concurred in Judge LEVET's findings and conclusions (R. 320-23).

Judge RYAN also wrote a separate opinion, in which he observed that the electorate could change the present system by convening a constitutional convention—but chose not to do so (R. 322). He emphasized that although it is clear that the equal protection clause does not prevent a state from giving some consideration to factors such as the interests of counties, geography, and concentration of political power, "all that plaintiffs have illustrated is that the apportionment is not based solely on population" (R. 321).

ARGUMENT

Introduction and Summary

The instant case presents the fundamental question of whether the Fourteenth Amendment requires a state to apportion its legislature according to a strict population standard without regard to any other factors.

In apportioning its state legislature, New York follows a formula which is written into its constitution and has been part of its fundamental law since 1894. This formula stresses per capita representation in both houses of the legislature, but also requires that certain other factors be taken into account in apportioning seats. As the Solicitor General points out in his brief amicus curiae in this case, the New York apportionment is not subject to attack as creating gross inequalities among voters without rhyme or reason. There is no "crazy-quilt" pattern or manifestly capricious discrimination. The apportionment is systematic and is kept reasonably current.

New York ranks twelfth among all the states of the Union in its adherence to per capita representation. It departs from that standard only in three respects. First, it guarantees at least one representative for each county in the Assembly. Second, it provides that seats in the Senate which are apportioned to the most populous counties may be apportioned only on a full ratio. Third, it provides that any increase in the Senate representation of the most populous counties since 1894, when the present apportionment formula was devised, shall result in an increase in the size of the entire membership of the Senate so as not to diminish the aggregate representation of the other counties. The question presented, therefore, is whether these departures from a per capita standard infringe the Fourteenth Amendment.

I

A. Although New York's apportionment formula emphasizes per capita representation in both the Senate and the Assembly—and it could be sustained even under a test which demands close adherence to a per capita standard—we do not believe that there is any necessary connection between that standard and the mandates of the Fourteenth Amendment. To be sure, our democratic tradition demands that all men have an equal voice in the councils of government—and this Court's decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), has enabled the federal Courts to enforce the guarantees of the Fourteenth Amendment wherever it is clear that a state departs from this important principle. However, there is no warrant for espousing a doctrine of per capita representation as the sole test of equality. Obviously, there are factors other than per capita representation which determine whether one citizen has a voice in the legislature "equal" to that of another citizen. The problem of "equality" is complex because a voter in one constituency may, for various reasons, be better or less able to influence his legislator than would a voter in another district; therefore, he might have a greater or lesser voice in the legislative process than his neighbor in another constituency. This inequalty might arise, for example, because a citizen who desires to make his wishes known on a topic affecting the government of his county does not find a ready voice through his legislator since that county is only part of a multi-county legislative district. It might also arise because he lives in a sparsely populated district which covers so large an area that its legislator may be called upon to represent a great variety of diverse interests, often opposed to each other, and may have to choose which of these interests he will espouse. The problem of "equality" is thus far different in the area of legislative apportionment, where one is concerned with the problem of "equalizing" political power between residents of different constituencies, from

what it is in a state-wide election or any other situation where one is concerned only with "equalizing" power between residents of the same constituency. *Cf. Gray* v. *Sanders*, 371 U. S. 368 (1963). Per capita representation alone is not a guarantee of equality in the former situation and, in fact, it may often result in gross inequalities in the legislative process.

The central command of the Fourteenth Amendment with respect to apportionment is that governments must be responsive to the popular will. This standard alone commands the backing of our democratic traditions, and it is entirely appropriate to measure the structure of a state legislature against this principle. Thus, we believe that any inquiry under the Fourteenth Amendment into the apportionment of a state legislature should begin by ascertaining whether that apportionment is grossly at odds with the standard set by the last expression of the popular will. If, for example, a legislature does not adhere to the standards set down by its own state constitution, and it has failed to reapportion the state over a long period of time despite significant population shifts in that interim, a court might well be justified in striking down the existing apportionment. This standard would be fully in line with past decisions of this Court. First, it would subject to particular scrutiny actions of the state legislature which defy the popular will and therefore clog the processes of political change. *Cf. United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938). Second, it would recognize that there is a great likelihood that an apportionment which departs from existing standards under the state constitution will reflect no coherent policy but simply arbitrary action which has long been condemned under the Fourteenth Amendment. This standard—although only a starting point of inquiry—would dispel the notion that per capita representation is the sole way to guarantee all voters equal access to the legislature and would focus attention on the basic principle that the government of a state must rest not on the

whims of a legislature which has locked itself into power, but on the consent of the governed.

Because "equality" is so elusive in this area—and because its pursuit often leads to deviation from per capita representation—an overwhelming majority of our states depart from a per capita standard in both houses of their legislature. For example, in Alabama, a legislative majority may be formed in the Senate from constituencies comprising 25.1% and, in the lower house, 25.7% of the state population. In Maryland, such a majority can be formed in each house, from constituencies containing 14.2% and 25.3%, respectively, of the population.

The many other traditional factors which go into an apportionment play no less important a role than does the per capita standard. First, it is often desirable to guarantee each county a minimum of one representative in a state legislative chamber, so that the voters of that county may have a voice in the legislature on matters affecting the relation of that county with the state. Second, it may be desirable to limit the effect of an existing apportionment caused by rapid population shifts, so that legislative districts may not become so large as to lose contact between the representative and his constituency and to forsake any hope that a district will reflect community of interest among its electorate. Third, it may be necessary to place some reasonable limit upon the representation of the larger counties of the state, so that the interests of voters in the smaller county will not be ignored. *Cf. MacDougall* v. *Green*, 335 U. S. 281 (1948). These factors may appropriately be considered, along with per capita representation, in each chamber of the legislature.

Of course, the legislature of a state is not entirely free of restraint in the apportionment process. If an apportionment is a "crazy quilt" or if it implements an impermissible state policy, it should be struck down under

the familiar principles of the Fourteenth Amendment. An arbitrary apportionment will most often arise where the legislature fails to reapportion over a long period of time or where it either is not bound by its state constitution to follow any set apportionment formula or, although bound by a principled formula written into its constitution, it ignores that formula and enacts a seemingly inexplicable apportionment. The situation is vastly different when a legislature consistently follows a principled formula for apportionment written into its own constitution. The presumption of constitutionality is then strongest and the apportionment must be upheld unless it is "without any reasonable basis". *Morey* v. *Doud*, 354 U. S. 457 (1957).

B. Appellants bore the burden of showing that New York's formula violates the constitution. If, as we firmly believe, per capita representation is not the sole permissible factor in an apportionment system, appellants could not satisfy their burden simply by showing that the New York formula takes into account other factors to mitigate some of the less fortunate effects of a per capita standard. If the burden of proof would shift upon a demonstration of mere statistical disparities from per capita representation, a plaintiff could succeed in making a prima facie case in virtually every state of the union. Although every state apportionment is entitled to a presumption of constitutionality, the presumption is especially strong where, as in New York, the apportionment is based on the formula set forth in the state constitution, since the basis for apportionment is clearly set forth and there is no need to call upon the state to explain the rationale of its actions.

Although New York's formula adheres substantially to a per capita standard in both houses of the Legislature, it combines this factor with three other criteria—none of which can conceivably be categorized as irrational. First, New York recognizes that many of the interests which a citizen may wish to assert in the legislative process are

interests which touch on his relation to the government of his county as well as the state. Each of New York's 62 counties plays a vital role in state government and has done so throughout the State's history. One of the functions of a legislator is, therefore, to serve as a liaison between the county and state governments. Unless there were some guarantee of minimum representation to the electors of a single county, the less densely populated counties would be grouped together in districts where the necessary liaison function would disappear. Thus, the New York constitution guarantees at least one Assemblyman to each county and places certain limitations on the per capita standard in the Senate which tend to restrict the number of multi-county Senatorial districts and thus allow many of the less populated counties to have their own Senator. Second; New York has recognized that the physical size of a constituency may have a significant bearing on the voter's capacity to influence the legislative process. If a strict population standard governed apportionment in this state, districts would become so large that a legislator and his constituency might be inaccessible to one another and a district would cease to represent any significant community interest among its voters. To meet this problem, New York has provided that additions to the representation of the more populous counties since 1894 should be added to the total size of the Senate instead of being taken from the less populated counties. In this way, it restricts the size which a district in a sparsely populated area must cover. The other provisions of the formula also tend to further this same goal by eliminating multi-county districts in the Assembly and by limiting the representation of the more populous counties in the Senate. Third, New York has taken into account the heavy concentration of population and political power in its cities—particularly New York City—which gives these areas power in the Legislature far beyond that which would accrue to it even in terms of a strict per

capita standard. In order to limit the concentration of such power, New York has provided that no county having more than three Senators may gain an additional Senator, save on a full population ratio. The provisions for one Assemblyman per county and additions to the total size of the Senate also tend to further that goal. These three considerations, along with the basic per capita standard adhered to by the New York formula, have been retained by the people of the State in their constitution since 1894. Although the counties supposedly discriminated against have had an opportunity to change these provisions by a constitutional convention, they have not done so, and, in fact, there is every indication that all the people of the State are well satisfied with the balance which has been achieved.

The most striking fact about the New York apportionment, however, is not that it takes into account these factors—but that it adheres more strictly to a per capita standard than do three-quarters of the other states of the union. New York ranks twelfth among the states in its adherence to per capita representation. In fact, the population figures themselves conclusively refute appellants' allegations that New York discriminates against its densely populated urban areas. According to the 1960 census, the six counties represented by the six individual plaintiffs here have 56.2% of the total citizen population of the State, and control 48.0% of the Assembly and 48.3% of the Senate. In the projected apportionment, they will control 45.6% and 46.0%, respectively, of the two houses. The ten most heavily populated counties in this state, with 73.5% of the total citizen population, now have 65.5% of the seats in the Senate and 62.0% of the seats in the Assembly. In the projected apportionment they will have 64.9% and 61.3%, respectively, of the two houses. Each of these counties is very heavily urban. Indeed, it is difficult to see how the New York apportionment could be more in line with a per capita standard and still take into account other

considerations which are just as necessary to guarantee each citizen an equal voice in the Legislature.

Appellants' argument that New York's apportionment constitutes a "crazy quilt" adds nothing to the strength of their position. For the most part, they merely chafe at the necessity for drawing a line at some point to determine the number of representatives to be allotted to a county and they argue that it is irrational to give one county more representatives than another when it has only slightly greater population. This kind of argument, of course, merely demonstrates the weakness of any attempt to show arbitrariness in the New York formula. Appellants' "crazy quilt" argument does, however, focus on two points which are worthy of discussion. First, they maintain that the Senate apportionment is irrational because it does not show any consistent bias in favor of either rural or urban counties. This does not, of course, demonstrate irrationality—but we maintain that it does demonstrate that appellants themselves recognize that they have utterly failed to prove the allegation of pro-rural bias contained in their complaint. Second, appellants argue that the rules for districting the Assembly are arbitrary because they provide that each Assembly district must be wholly contained within one Senate district, so that one Senate district in a given county may contain two Assembly districts while an adjoining Senate district in the same county contains only one Assembly district. We believe that the pleadings and the record in this case raise no challenge to the districting rules and, therefore, that they are not properly before this Court. However, even if they were at issue, there would be no merit to appellants' contentions. The rule for drawing district lines in the Assembly is an obviously justifiable attempt to curb gerrymandering by local authorities (who draw Assembly district lines) and also to coordinate the constituencies of the two houses. The New York constitution is, in fact, anything but arbitrary. It has established a systematic plan for apportioning legislative seats which

gives heavy emphasis to per capita representation, while relying also on other perfectly rational factors which tend to promote equal access by all citizens to the legislative process.

II

A. Even if appellants had succeeded in presenting a colorable constitutional claim, relief should be denied here since there are no standards by which an equity court could fashion a decree in this action. There is no sure guide to how much weight must be placed on per capita representation, in contradistinction to other legitimate factors which traditionally have been thought necessary to guarantee each voter an equal opportunity to influence the legislative process. It is beyond any standard of principled adjudication to determine the extent to which these other factors may be included in an apportionment. We further believe that it is unwise to strike down, on the strength of some abstruse notion of per capita representation, a legislative apportionment system which is delicately intermeshed with other parts of the governmental process. The apportionment of one chamber of the Legislature is intimately tied to that of the other and also to the executive branch of the state and to its entire political structure. To tamper with this complex inter-relationship may indeed be to impose a cure which would be worse than the disease. The problem as it arises here is even more acute than it is in the ordinary case involving the exercise of a court's equitable discretion. Unless a decree can be drafted which is sufficiently precise to advise a legislature of its rights and duties under the Fourteenth Amendment, the politics of the state would be left in a hopeless tangle.

B. Even if a court were to undertake—in the face of all these difficulties—to decree substantive standards for apportionment in excess of those provided by the state's own constitution or by the Fourteenth Amendment's familiar prohibitions against arbitrariness, it is quite obvious that

it should do so only in the most compelling circumstances. The New York situation presents no such occasion for the exercise of federal equity power. New York adheres substantially to a per capita standard in both houses; in fact, it ranks twelfth in the nation in its conformity to such a standard. Its urban counties—which appellants claim are dominated under the current apportionment by other less populated "rural" neighbors—have a clear majority of the State Legislature. The citizens of the most populated counties have had ample opportunity to change the present apportionment system by convening a constitutional convention. Finally, New York City and its metropolitan area, by virtue of sheer size, wield an institutional power in the State that cannot be measured solely in terms of its representation in the Legislature or even in terms of its influence on state-wide elections. Looking to the governmental process in its entirety, it is apparent that the New York system is responsive to all segments of the electorate and that there is no warrant for the exercise of federal equity power.

III

A. The District Court properly rejected appellants' offer to show that the delegates to the 1894 Convention "intentionally" discriminated against urban voters and, in particular, the voters of New York City, in framing the apportionment provisions here challenged. It is well established that such proof is utterly incompetent. It is an unsupported foray into legislative motive, and assumes, without support in law or reality, that there can be a single such "motive" for a large deliberative body. The only question for the courts is the power of the Convention, under the federal Constitution, to adopt the challenged provisions, not the private beliefs which impelled it to do so. Moreover, the proffered proof could add nothing to appellants' case. There is no question here of the delegates' "intention" to deviate from a strict per capita

standard. Obviously, the formula tempers such a standard with other factors and the only question before the Court is not "intention" but the constitutional validity of the use of these factors.

B. The District Court was also correct in rejecting appellants' offer to prove that the Legislature, as a result of its claimed pro-rural bias, discriminated against urban areas in imposing taxes and distributing revenues. The Constitution does not regulate the allocations of taxes or revenues among a state's subdivisions. If a legislature passes an unconstitutional act, one may not claim malapportionment in order to strike down that act; on the other hand, if a legislature acts constitutionally, one may not show malapportionment by asserting the lack of wisdom of a legislature's actions. The offer was completely irrelevant, and attempted to involve the Courts in a purely political question to be thrashed out in the Legislature.

C. Finally, we believe that the District Court was clearly correct in rejecting appellant's offer to produce "expert" testimony as to whether the present apportionment was "fair and equitable". Obviously, the question of whether an apportionment formula is consistent with the Fourteenth Amendment is one for the Courts, not for "expert" testimony. It is interesting to note, however, that since the *Baker* decision, the "experts" have warned — with good reason — that any mandate to follow a strict per capita standard could only result in a setback for the cause of viable, responsive state government.

POINT I

New York's formula for apportioning seats in its Legislature is entirely consistent with the Fourteenth Amendment.

In this section of our brief, we shall show that New York's apportionment formula is free from any taint of unconstitutionality—whether it be tested under the traditional standards set down by this Court's past decisions under the Fourteenth Amendment, or by additional criteria which some commentators have urged are especially appropriate for apportionment cases, or even by standards—assuming them applicable—prescribing per capita representation as the dominant factor in any apportionment.

We have divided this section into two parts.

In the first part, we attempt to develop a standard for reviewing an apportionment under the Fourteenth Amendment. Although New York's apportionment formula emphasizes per capita representation in both the Senate and the Assembly—and it could be sustained even under a test which demands close adherence to per capita representation—we take issue with appellants' position that the starting point for measuring an apportionment is the per capita standard. We point out that there is no reason for assuming that per capita representation maximizes equality of representation; in fact, we argue that there is good reason to believe that such a standard will result in manifest inequality unless it is tempered by other considerations. We advocate that the Court, instead of adopting a per capita standard, focus first and directly on the problem of assuring that legislatures be responsive to the popular will. We suggest that such an emphasis, supplemented by familiar rules against arbitrary distinctions and invidious discrimination, would meet the need to insure that the voters of a state have reasonably "equal" access to its legislative process.

In the second part of this section, we deal with the specific facts presented by the instant case. We show, first, that New York's apportionment formula meets the needs of the State by assuring that the Legislature remains responsive to the popular will while preventing domination of the State by any one locality. Second, we show that the formula would survive even a rigorous comparison with a per capita standard. Finally, we demonstrate that, contrary to arguments advanced by appellants and those associated with them, there is no conflict between the apportionment formula and the familiar constitutional prohibitions against arbitrary distinctions and invidious discrimination.

A. The standard under the Fourteenth Amendment.

1. The lesson of Baker v. Carr: Governments must be responsive to the popular will.

It is paradoxical that appellants interpret this Court's momentous decision in *Baker* v. *Carr*, 369 U. S. 186 (1962), as a death knell for efforts by a state to structure a legislature in which all citizens may be equitably represented. One would have thought that the *Baker* decision would be regarded as a spur to the states to bring apportionments of past eras up to date and to devise more effective systems for reflecting the varied interests of its people in the councils of government. Instead, appellants and those associated with them have read *Baker* to mandate each state to apportion legislators among its political subdivisions solely with regard to the number of residents in such subdivisions and without any regard to the degree to which each resident may have access to his legislator and may claim through him a voice in civic affairs.

We share appellants' concern that all men should have an equal voice in the councils of government. Our democratic tradition demands no less of us. *Cf. Gray* v. *Sanders*, 371 U. S. 368 (1963). But it is quite another matter to

espouse a doctrine of per capita representation as being the sole test of equality. It is somewhat akin to saying that citizens are taxed "equally" only when they pay the same dollar amount to their government, regardless of how much they earn, or that a laborer is treated "equally" with his large corporate employer only when he is prohibited from entering a combination bent on increasing the rate of return for his services.

Obviously, there are factors other than per capita representation which determine whether one citizen has a voice in the legislature "equal" to that of another citizen. As this Court itself noted, "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government." *MacDougall* v. *Green*, 335 U. S. 281, 283 (1948). For example, a citizen residing in a sparsely populated county included in a multi-county legislative district, desiring to assert his power in the legislature on a matter affecting affairs of his county, could hardly hope to do so as effectively as could a citizen whose legislator represents the residents of only one county. Thus, it may be desirable to "equalize" the power of the two voters by guaranteeing each county a minimum of one representative in a legislative chamber. As another example, a voter in a thinly populated district—which, under a per capita standard, would necessarily embrace a large geographic area—might have to compete for the attention of his legislator with other citizens living far from him and having many interests diverse from his. A voter living in a more compact district, on the other hand, could combine with others living relatively near him and likely to have interests in common with his own. Again, it might be desirable to "equalize" the power of the two voters—in this instance, by limiting the extent to which increases in population in some localities could further increase the physical area of the more sparsely populated units, as, for example, by providing that the increased representatives from the more populated localities be added to the total number of repre-

sentatives in a legislative chamber. As a final example, a group of voters in a sparsely populated area might find their needs of little concern to the rest of the state. If their interests are to be given an equal opportunity for consideration by the legislature, it may be desirable to place some reasonable limit on the representation of the large counties in order to guarantee that the smaller ones will not be totally ignored. For these reasons we do not believe that the notion of "equality" of representation can be equated with that of per capita representation. In fact, the two are, in many respects, diametric opposites.

In sum, it is far more complex to "equalize" political power between residents of different legislative constituencies than it is to "equalize" power between residents of the same constituency. *Compare Gray* v. *Sanders*, 371 U. S. 368 (1963). In the latter case, each voter has equal access to an elected official—or as nearly equal access as the law can possibly guarantee—if his vote is counted equally. Through that official, he has access to government equal to that of every other member of the same constituency. In the former case, however, an individual voter in one constituency may, for reasons such as we have suggested, be better or less able to influence his legislator than would a voter in another district and, therefore, have a greater or lesser voice in the legislative process than his neighbor in another constituency.

Appellants and those associated with them apparently recognize the illusive nature of "equality" in legislative apportionments, for they carefully hedge their argument by admitting that there are factors other than a strict per capita standard which may play a part in a legislative apportionment. However, with a tenaciousness which we feel is unwarranted in logic, they suggest that a per capita standard—if not the only permissible standard under the Fourteenth Amendment—must be at least the starting point of any inquiry into the constitutionality of an apportionment. According to their position, any substantial

deviation from this standard would render an apportionment suspect, and might well result eventually in its being struck down. There is little, in principle, to support such a position. If, as we have suggested, per capita representation bears no necessary relation to equality of access to government—and in many cases bears a negative relation to that goal—there certainly is no more reason for per capita representation to be the starting point of inquiry than there is for it to be the ultimate touchstone of constitutionality.

What, then, would be the warrant for reading a requirement of per capita representation into the Fourteenth Amendment? Would it not be a return to outmoded principles of adjudication, long since abandoned by this Court, in which the Fourteenth Amendment was thought to embody particular theories of government, economics and other social sciences and thereby to preclude the states from experimenting with other, perhaps sounder theories? *Cf. Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). Could a decision that there was not sufficient reason in a given case for departures from per capita representation be anything more than "a subjective ipse dixit" based, like the theories put to rest by the *Ferguson* decision, upon personal predilection rather than reason? See McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54, 73 (1962).

Surely the principles which moved this Court to action in *Baker* v. *Carr*, 369 U. S. 186 (1962), rest on firmer ground than that occupied by the notion of per capita representation. In fact, we believe there is no reason why the focus of any inquiry into the validity of an apportionment should not rest directly on the great principle of the *Baker* decision itself—that state legislatures cannot entrench themselves as self-perpetuating oligarchies but must remain responsive to the popular will.

The facts of the *Baker* case itself are an excellent example of the need for such a principle. There, a state legis-

lature, with seemingly no rationale save self-perpetuation, resisted any reapportionment for over 60 years—in blatant disregard of the provisions of its own state constitution. The people of the state had no remedy available except recourse to the Courts. In short, the legislature had long since ceased to be responsive to the popular will. Power, instead of being derived from the people, was "locked in the hands of the legislature." See McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54, 71 (1962).

The principle that governments must be responsive to the popular will, unlike that of per capita representation, is one that certainly commands the backing of our democratic traditions and is fundamental to the workings of our institutions. It would be entirely appropriate to measure the structure of any state legislature against this ideal. Such a principle would do no violence to the freedom of each state to determine for itself the best way to guarantee each voter an equal opportunity to be heard in the legislature. And—equally important—it would focus the attention of the Court on the genuine evil, which is not that state legislatures depart from per capita representation but that they often depart from the limits set on them by the people themselves.

Such an inquiry, of course, would begin by ascertaining whether an apportionment is grossly at odds with the standard set by the last expression of the popular will. See McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54, 71 (1962). If, for example, there had been a significant passage of time since the last apportionment, with significant population shifts in the interim, and the legislature did not adhere to the standard of its own state constitution, a court might well be justified in striking down an existing apportionment.

Such a standard would be fully in line with past decisions of this Court: First, the Court has suggested in the

past that legislative action which restricts the political processes is particularly vulnerable to scrutiny under the Constitution. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-53 n. 4 (1938). A fortiori, legislative refusal to comply with an existing mandate of a state constitution —thereby clogging the processes of political change— should be a subject of special concern to the Courts. Second, there is a great likelihood that an apportionment which departs from existing standards under the state constitution will fall afoul of "well developed and familiar" standards under the Fourteenth Amendment since it most probably reflects "*no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U. S. 186, 226 (1962). See Lucas, *Legislative Apportionment and Representative Government*, 61 Mich. L. Rev. 711, 746 (1963); Neal, *Baker* v. *Carr: Politics in Search of Law*, 1962 Sup. Ct. Rev. 252, 290-91 (1962). Third, there is ample precedent for referring to state law as a starting point of inquiry under the Fourteenth Amendment. For example, in determining whether or not evidence admitted at a state criminal trial was illegally obtained, it may become relevant to ascertain whether the defendant had been validly arrested under state law before the evidence was seized from him. *Ker* v. *California*, 374 U. S. 23, 37 (1963) (opinion of CLARK, J.).

Finally, our proposed standard would explain the relevance of the availability of a political remedy to the voters of a "malapportioned" state. *Cf. Baker* v. *Carr*, 369 U. S. 186, 251, 258 (1962) (CLARK, J., concurring). If, as we believe, the central question in any apportionment litigation should be the degree to which the state legislature has remained faithful to the popular will, it is clearly relevant—especially where a legislature has strayed from the provisions of its own constitution or where, as is often the case, a state constitution contains no binding principles for apportionment—to determine whether the people of the state have approved an existing system or whether

it has been perpetuated by the legislature in spite of the popular will.

Obviously, this suggested standard offers only a starting point for inquiry. It will not and cannot determine the decision in every apportionment case. If, for example, a state apportionment rests on no rational basis, it might fall under the familiar prohibitions of the Fourteenth Amendment regardless of its popular antecedents. If, on the other hand, a state constitution contained no guiding principles for apportionment, it would still be open to the legislature to enact a rational system which does not give sole emphasis to a population standard. The difference in approach in each case is a matter of degree. But it is nevertheless an important difference—for it once and for all dispels the notion that a principled method of apportionment, approved by a majority of the voters of a state, which seeks to guarantee all voters equal access to the legislature, is somehow suspect because it does not equate "equality" with strict per capita representation.

2. *The role of per capita representation.*

To the extent that per capita representation has played a role in apportionment throughout our states, it has done so only as one of a number of factors.

This Court, in *Baker*, made it crystal clear that population is not the only criterion for apportionment. In fact, although the Court took great pains to avoid discussing the merits of the *Baker* complaint (369 U. S. at 197), five Justices nevertheless pointed out that it was appropriate for a state to use factors other than population in apportioning its legislature. 369 U. S. at 241, 244-45 (DOUGLAS, J., concurring), 251, 258 (CLARK, J., concurring), 265, 266 (STEWART, J., concurring), 266, 279 (FRANKFURTER, J., dissenting), 330, 334 (HARLAN, J., dissenting).

An overwhelming majority of our states depart from a per capita standard in both houses of their legislature.

Dixon, *Apportionment Standards and Judicial Power*, 38 Notre Dame Law, 367, 375-76 (1963). In 73 of our 99 state legislative chambers, legislators representing constituencies totalling less than 40 per cent of the population form a majority of the chamber. Only five states have apportionments in which neither house has a majority elected by constituencies containing less than 40 per cent of the state's population. Legislators representing constituencies comprising less than one-third of the population form a majority of one house in 47 legislative chambers, and in 12 states they form a majority of both houses. See Goldberg, *The Statistics of Malapportionment*, 72 Yale L. J. 90 (1962).

The nation-wide statistics are also reflected in the four states whose apportionments are now before this Court for plenary review. In Alabama, a legislative majority may be formed in the Senate from constituencies comprising 25.1% and, in the lower house, 25.7% of the state's population. National Municipal League, Compendium on Legislative Apportionment, p. iii (2d ed, 1962). *Cf. Sims* v. *Frink*, 208 F. Supp. 431 (M. D. Ala. 1962), *prob. jurisd. noted*, 374 U. S. 802 (1963), No. 23, Oct. T. 1963. In Maryland, such a majority may be formed in each house, from constituencies containing 14.2% and 25.3%, respectively, of the population. National Municipal League, *op. cit. supra*, p. iv. *Cf. Maryland Comm. for Fair Representation* v. *Tawes*, 229 Md. 406, 184 A. 2d 715 (1962), *prob. jurisd. noted*, 374 U. S. 804 (1963), No. 29, Oct. T. 1963. In New York, a majority may be formed from constituencies representing 36.9% and 38.2%, respectively, of the population. National Municipal League, *op. cit. supra*, p. ii. In Virginia, a legislative majority may come from constituencies representing 37.7% and 36.8%, respectively, of the state's population. *Id.*, p. iv. *Cf. Mann* v. *Davis*, 213 F. Supp. 577 (E. D. Va. 1962), *prob. jurisd. noted*, 374 U. S. 803 (1963), No. 69, Oct. T. 1963. In short, the cases reflect all parts of the spectrum with re-

spect to the per capita standard. Of all the states of the union, Virginia and New York rank second and twelfth, respectively, with respect to the weight they accord per capita representation, while Alabama and Maryland are thirty-ninth and forty-fourth, respectively, on the same scale. David and Eisenberg, Devaluation of the Urban and Surburban Vote 5 (1963).

It is obvious from the figures that per capita representation is not and has not been the sole measure of state apportionment. See also *Blaikie* v. *Power*, 13 N. Y. 2d 134, —— N. E. 2d —— (1963) (sustaining county-at-large minority representation in the New York City Council). Other factors—which we shall now discuss—play no less important a role in our representative traditions.

3. *The role of other devices for assuring that Government rests on the consensus of the governed.*

The role of the many traditional factors which go into an apportionment has been widely disparaged and misunderstood—to a large extent, because advocates of the per capita standard have been flaying a straw man. The Solicitor General, for example, states that factors other than per capita representation should not "have value as such" (Br., p. 23); but this statement, of course, fails to address itself to the issue. It is true that area, political subdivisions, population density and the like are not valued "as such" in an apportionment, but neither, for that matter, is per capita representation. The important value is that each citizen—no matter whether he lives in a district spanning a large area or one that is relatively compact, whether he lives in a highly populous county or in a county with a small electorate, whether he lives in a thickly populated area or a thinly populated area—should have equal access to the legislative process so that the legislature may be responsive to his needs.

We already have alluded to at least three factors which we believe should be taken in account, along with per

capita representation, in devising a successful apportionment system. First, we believe that it is often desirable to guarantee each county a minimum of one representative in a state legislative chamber. Many of the issues which a voter seeks to press through his legislative representative involve matters which also touch on his relation with county government. For example, voters interested in a new road being constructed by a county government may be eager to have the state legislature appropriate additional funds for such a project, or to have the legislature pass any enabling statutes which are necessary for the project. Such matters, which involve the relation between county and state government, require that the voters of each county be guaranteed at least one representative in the legislature. It may also be desirable to limit the effect on an existing apportionment caused by rapid population growth in already populous areas. Otherwise, legislative districts in the less populous localities may have to span so wide an area that voters in one part of such a constituency will share little in common with voters in another part of the same district. Such voters would be disadvantaged in attempting to influence their representative, unless there were some ameliorating feature built into the apportionment system. Finally, it may be necessary to place some reasonable limit on the number of representatives apportioned to the larger counties, in order to assure a proper diffusion of political power among voters in all parts of the state so that no one small group of counties can control the legislature and ignore the needs of the rest of the state. *Cf. MacDougall* v. *Green*, 335 U. S. 281 (1948). In our view, these factors are just as significant as the per capita standard in affording each voter an equal opportunity to make his wishes felt in the legislature.

Of course, these factors are not limited to the problem of apportioning state legislatures, and it is hardly surprising that they also are reflected in those provisions of the

federal Constitution which guarantee two Senators to each state, U. S. Const. Art. I, § 3, and provide that each state shall have at least one seat in the House of Representatives, U. S. Const. Art. I, § 2. Although the advocates of sole reliance on a per capita standard argue vigorously that the federal system has no bearing on the interpretation of the Fourteenth Amendment, we believe that their argument misses the point. Even if we assume—contrary to this Court's holding in *MacDougall* v. *Green*, 335 U. S. 281, 283 (1948)—that it would not be strange to hold that the Fourteenth Amendment strikes down a system promulgated by the Constitution itself, it would nevertheless be pertinent to note that the same considerations which prompted the founding fathers to shun a per capita standard in both houses of the Congress are equally operative in the field of state legislative apportionment. See Israel, *On Charting a Course Through the Mathematical Quagmire*, 61 Mich. L. Rev. 107, 123-24 (1962).

The "federal analogy" does, however, come up in a kind of reverse twist. For example, appellants argue (Br., pp. 49-50) that if the Court were to accept this "analogy", it must decide which of the two houses of a bicameral legislature must be apportioned on a per capita basis and which house may give weight to other factors. The assumption is, of course, that per capita representation must be the standard for one chamber if not for both. We believe that this assumption is completely unwarranted. To start with, its premise is ill-founded—the Congress does not adopt per capita representation in either house. It shuns it completely in the Senate, and it provides a minimum guarantee of one representative per state in the House of Representatives—the same guarantee as is embodied for each county in the New York Assembly. Moreover, the conclusion is utterly lacking in logic. If it is rational to temper per capita representation with other factors in one house, why is it irrational to do so in both houses? See Neal, *Baker* v. *Carr*: *Politics in Search of Law*, 1962 Sup. Ct. Rev. 252, 286 (1962). There may be factors, such as those

limiting the size of a district or guaranteeing one representative per county, which are appropriate for consideration in both houses. *Cf. Caesar* v. *Williams*, 371 P. 2d 241 (Idaho, 1962); *Jackman* v. *Bodine*, 78 N. J. Super. 414, 188 A. 2d 642 (1963). Or, a state may find more suited to its needs an apportionment which guarantees one legislator per county in one house, while placing reasonable limitations, for example, on the size of the districts or on the number of representatives from any area, in the other house. In this way, the state may retain per capita representation to some degree in both houses while giving appropriate weight to other important factors in each house.

4. *The role of familiar standards under the equal protection clause.*

We believe, for the reasons we already have stated, that it is open to a state to construct a principled apportionment which relies on standards other than per capita representation in an attempt to give each citizen equal access to the legislative process.

This is not to say, however, that the legislature of a state is entirely free of restraint in the apportionment process. As this Court noted in the *Baker* decision, "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." 369 U. S. at 226. Thus, an apportionment may fall because it is a "crazy quilt," without any apparent rhyme or reason, *cf. Baker* v. *Carr*, 369 U. S. 186, 231, 256 (CLARK, J., concurring), or because it implements an invidious state policy, such as deliberately abridging the vote of a racial or religious minority. *Cf. id.* at 266, 300 (FRANKFURTER, J., dissenting).

An arbitrary apportionment may arise in several ways. Most often, as in *Baker* itself, it will come about simply

through the failure of the legislature to reapportion over a long period of time. See Note, 72 Yale L. J. 968, 995 (1963). Sometimes, it may arise when a legislature, not bound by the state constitution to follow any specific apportionment formula, enacts an apportionment which seems on its face to have no reasonable basis at all. *Cf. Mann* v. *Davis*, 213 F. Supp. 577 (E. D. Va. 1962), *prob. jurisd. noted*, 374 U. S. 803 (1963), No. 69, Oct. T. 1963. Occasionally it may arise when a legislature, although bound by a principled apportionment formula written into its state constitution, ignores that formula and enacts a seemingly inexplicable apportionment. In all these cases, it is incumbent upon the state to explain the factors on which it relies to support the rationality of the apportionment. If these factors remain unexplained, *cf. Mann* v. *Davis*, *supra* at 584, it is open to a Court to hold that, on the particular facts, the apportionment is arbitrary.

The situation is vastly different when a principled formula for apportionment is written into the state constitution and is consistently followed by the legislature. Of course, that does not inevitably immunize the formula from challenge under the Fourteenth Amendment. But—on the other hand—there is a strong presumption of constitutionality attached to such a system and, under the familiar standards of the Fourteenth Amendment—made applicable to apportionment cases by the *Baker* decision—such a state determination must be upheld unless it is "without any reasonable basis". Rationality, not "mathematical nicety", is the relevant test of constitutionality. *Morey* v. *Doud*, 354 U. S. 457, 463-64 (1957).

B. The New York formula is constitutional.

1. Burden of proof.

Before we turn to an examination of the specific features of New York's apportionment system, we believe it is appropriate to point out that appellants bear the burden of

showing that New York's formula "does not rest upon any reasonable basis, but is essentially arbitrary." *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584 (1935).

Appellants have argued (Br., pp. 52-55) that the normal rules regarding burden of proof do not apply in this case and that we, not they, bear the burden of proof. They state that where a constitutional challenge relates to "basic civil liberties", instead of to classifications "of an economic nature", the presumption of constitutionality disappears as soon as a colorable complaint is filed. This is, of course, a virtual elimination of this presumption and a complete reversal of existing law. See, *e.g.*, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). Even if appellants' argument were restricted to cases where apportionments varied from a per capita standard, their novel conception of a plaintiff's burden has no justification in reason or experience. If—as we firmly believe—per capita representation is not the sole permissible factor in an apportionment system, there is no reason at all to shift the burden of proof to the state just because a system uses other factors to mitigate some of the less fortunate effects of a per capita standard. And appellants' theory proves too much; under it, they would likewise succeed in making a prima facie case on the barest statistical showing in virtually every state of the union. See *Baker* v. *Carr*, *supra*, 369 U. S. at 266, 319 (FRANKFURTER, J., dissenting). For almost every state departs from a strict population standard—and for very good reasons, too. There is no reason to suspect unconstitutionality from a commonplace.

This is all the more true where, as in New York, the apportionment is based upon a formula set forth in the state constitution. Although we agree with appellants (Br., p. 54) that any state statute—not only a state constitution—is entitled to a presumption of constitutionality, there are practical considerations which differentiate the two cases.

Where a legislature passes an apportionment which is either at odds with the state constitution or not based upon a formula expressed in the constitution, it may be necessary to call upon the state at some point to explain the basis for the apportionment. *Cf. Mann* v. *Davis*, 213 F. Supp. 577, 584 (E. D. Va., 1962, *prob. jurisd. noted* 374 U. S. 803 (1963), No. 69, Oct. T. 1963. On the other hand, where the basis for the apportionment is clearly set forth in the state constitution, there is no such necessity. Moreover, where a state—as in *Baker* itself—acts in violation of its own constitution, there is reason for severe scrutiny under the Fourteenth Amendment because the normal political process in that state has been set at naught and cannot right itself. *Cf. United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-53 n. 4 (1938). Where, on the other hand, the legislature acts in conformity with the will of the people as embodied in the state constitution, the normal presumptions of compliance with federal standards should be at their strongest force.

Appellants' arguments on burden of proof merely point up the obvious: that their entire case depends upon a statistical showing of minimal departures from a per capita standard—departures which are inevitable if other important ingredients are to be accommodated in a viable apportionment system. It is to these ingredients that we now turn our attention.

2. *The New York formula provides for representation which is responsive to the popular will and at the same time prevents domination of the State by any one locality.*

Although, as we shall show, the New York formula adheres substantially to a per capita standard in both houses of the Legislature, it combines this factor with three other basic criteria—all of which appellant must show to be irrational.

First, New York emphasizes that many of the interests which a citizen may wish to assert in the legislative process are interests which touch on his relation to the government of his county as well as to the State, and that these interests consequently are often peculiar to the citizens of one county and its government.

In fact, New York State's 62 counties play a vital role in the State government. As Judge LEVET's District Court opinion noted (R. 307-312), the counties have been an integral part of New York's governmental structure since early colonial times. An understanding of New York's system of legislative apportionment must begin with some understanding both of the counties' historical importance and of their modern functions and responsibilities.

The county system really began in New York in 1683, when the first colonial assembly—consisting of eighteen freeholders, elected from different localities in the colony pursuant to the governor's writ*—created 12 counties. 3 Lincoln, The Constitutional History of New York 139 (1906). By the time of the Declaration of Independence in 1776, the counties had become firmly entrenched as the primary units of local government. County courts, having both civil and criminal jurisdiction, had been established in each county by the colonial legislature as early as 1692. With the creation of the offices of Sheriff

---

* Popular agitation for representative government led the Duke of York, then proprietor of the colony, to issue instructions to Governor Dongan on the 27th of January, 1683, to convene an assembly of not more than eighteen representatives, to be chosen by the freeholders of the colony. Since the instructions were silent as to the method of apportioning the representatives among the different parts of the colony—which had not yet been divided into counties—this matter was left to the discretion of the governor and council. The resulting apportionment of representatives to the first Assembly among the various localities combined the ideas of territory and population which have since controlled the distribution of members of the legislature. See 3 Lincoln, The Constitutional History of New York 137-138 (1906).

and District Attorney, law enforcement became organized on a county basis. Other functions, too—such as the building and maintenance of jails, courthouses, bridges and highways—had gradually come to be assumed by the county legislative bodies. See Drake, *History of the County Law*, Introduction to [McKinney's] N. Y. County Law pages xxvi-xix (1950). During the Revolutionary War, the counties organized their own militia to protect themselves, to furnish troops to the continental army and to man the frontier forts. *Id.*, p. xxxiii.

New York's first constitutional convention—the convention of 1777, held during the War—was composed of delegates from all of the counties except Richmond. 1 Lincoln, The Constitutional History of New York 485 (1905). The acknowledged importance of the counties is reflected in the 1777 Constitution's provisions for legislative apportionment. The 1777 Constitution provided (§§ X, XI, XII) for a Senate of 24 members, to be elected from four great senatorial districts, each composed of several counties, and (§ IV) for an Assembly composed of seventy members "to be annually chosen in the several counties". Provisions were made for periodically increasing or decreasing the number of representatives from a county in the Assembly (§ V) and from a district in the Senate (§ XII), as censuses showed population fluctations. The county, however, was distinctly recognized in the first Constitution as the primary unit of both Assembly and Senate representation: although each county was not guaranteed separate representation in either house, counties were not fragmented among two or more districts.

Prior to 1821, Assembly districts were several times composed of two or three counties, much as Senate districts may be under the 1894 formula. 3 Lincoln, *op. cit. supra*, 157. The Constitution of 1821, however, provided that every county was to be entitled to at least one member of the Assembly, and that no new county was to be created

unless its population would entitle it to a member (Art. I, § 7). The size of the Assembly, which had been increased to 100 by an 1801 amendment to the Constitution, was increased again, to 128 (Art. I, § 2), reflecting the increase in the number of counties which took place in the early 19th century, as people began to settle in the central and western portions of the State. The Senate, increased in size to 32 by an 1801 amendment, remained at 32 but with its members to be chosen from eight, rather than four, districts (Art. I, §§ 2, 5). Again, area and population were the two principal criteria in the apportionment of both houses, with the unity of interest of the counties receiving implicit recognition.

The Constitution of 1846 created 32 single member Senate districts, to be established on the basis of population but with the further provisions that the districts consist of contiguous territory and that no county be divided in the formation of a Senate district unless entitled to two or more Senators (Art. III, §§ 3, 4). The size of the Assembly was left at 128 by the Constitution of 1846, and the requirement that every county (except Hamilton, which would elect with Fulton) should be entitled to at least one member of the Assembly was retained (Art. III, §§ 2, 5). The County Boards of Supervisors, in counties entitled to more than one member were, however, given the power to divide their counties into districts containing as nearly as practicable an equal number of inhabitants, though they could not divide towns in forming the assembly districts (Art. III, § 5).

The many functions performed by the county in New York State today reflect both the historic gravitation toward the county as the central unit of political activity and the realistic fact that, as the largest of the local government units, the county is usually the most efficient and practical medium for initiating and carrying out programs beneficial to residents of the different areas of the state.

For example, state aid is administered by the counties in the following areas: educational extension work (N. Y. Education Law §§ 1104, 1113), community colleges (N. Y. Education Law §§ 6301, 6302, 6304), assistance to physically handicapped children (N. Y. Education Law § 4403), social welfare such as medical and other aid for the aged, the blind, dependent children, the disabled, and other needy persons (N. Y. Social Welfare Law §§ 153, 154, 257, 409)*, public health (N. Y. Public Health Law §§ 608, 620, 636, 650, 660), mental health (N. Y. Mental Hygiene Law, Art. 8-A, § 191-a), probation work (N. Y. Correction Law § 14-a), highway construction, improvement and maintenance (N. Y. Highway Law §§ 12, 112, 112-a, 279), conservation (N. Y. County Law § 219, 299-w, N. Y. Conservation Law §§ 205, 879), and civil defense preparations (State Defense Emergency Act §§ 23-b, 25-a).

County governments, are, of course, far more than instrumentalities for the administration of state aid. They have extensive powers to adopt, amend or repeal local laws affecting the county (N. Y. County Law §§ 301-309), and also play a vital part in the enactment of state laws which affect only a particular county or counties (See N. Y. Constitution, Art. IX, § 1). The enactment in 1959 of a new

---

* Although the administration of home relief started as a town and city function, the local administration of public assistance and care has today become primarily a county function. With the exception of the City of New York, and the counties of Dutchess, Orange, Oswego, Ulster and Cayuga, each county of the State is constituted a county public welfare district. The territory of each of the five latter counties, exclusive of the cities of Poughkeepsie, Newburgh, Oswego, Kingston and Auburn, is also constituted a county public health district. Subject to certain reimbursements from the State and other public welfare districts and the provision for the allocation of certain expenses between the county district and the towns and cities therein, each public welfare district is responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself (See N. Y. Social Welfare Law §§ 65-73, 74-75-a).

County Charter Law (N. Y. County Law, Art. 6-A), providing opportunity for the fundamental reorganization of county governments by county residents, has given the counties an even greater role to play in the social, economic and political life of modern New York.

Counties must work closely with one another, and with the state Legislature, if complex problems in areas such as transportation, conservation, electrical power, agriculture, crime prevention and law enforcement, public health and welfare, housing, recreation and unemployment are to be brought closer to successful solution. To perform its functions effectively, the county needs a representative in the Legislature who can represent its interests and bring its needs to the attention of the entire body. See Lewis, Legislative Apportionment, 71 Harv. L. Rev. 1057 n. 3 (1958). By the same token, the Legislature must know the needs and problems of all the areas of the state. Unless there were some guarantee of minimum representation to the electors of a single county, the less densely populated counties would be grouped together in multi-county districts in which the legislator's functions as a liaison between the county and state government would virtually disappear.

The 1894 Convention carefully took these considerations into account when it submitted the present formula to the people for approval. See, *e.g.*, 3 Revised Record of the Constitutional Convention of 1894, pages 1223-26 (1900). The provision of the New York apportionment formula which most obviously meets this need is that which guarantees at least one Assemblyman to each county. However, the two major provisions dealing with senatorial apportionment, the "full ratio rule" and the provision for enlarging the Senate, also tend towards this goal, since they allow many of the less populated counties to have their own Senator and restrict the size of multi-county senatorial districts. All three provisions operate, with varying degrees of directness, to keep the New York

Legislature a viable forum for administering the vast complex of county government in the State.

Second, New York has emphasized in its apportionment formula that the physical size of a district may have a significant bearing on a voter's capacity to influence the legislative process through his elected representative. If a per capita standard resulted in the creation of overly large districts in sparsely populated areas, a voter in such a district would be disadvantaged in two ways: (1) he would not have the intimate contact with his legislator possessed by a voter in a heavily populated district covering a relatively few city blocks—distance might prevent the voter from expressing his views to the legislator and the legislator from consulting his electorate; (2) a voter in an overly large district would be likely to lose one of the most important benefits of a single-member district system—representation in a district which has some modicum of shared problems, enabling the legislator to become a spokesman for views which might otherwise not be heard. If a district spans too large an area, there may well be no such community of interest among its voters, and one of the most important links between a citizen and the legislative process will have disappeared.

The extremely irregular population density in New York State makes it particularly necessary that geographical considerations be taken into account in any apportionment system. The six counties in which plaintiffs in this lawsuit reside contain 56.2% of the citizen population of the State, but constitute only 3.1% of its area (R. 61). On the other hand, the Assemblyman from St. Lawrence County, which covers 2,767 square miles (*id.*), an area larger than the State of Delaware, although he represents comparatively few people, represents a constituency that spans an extremely large geographical area; and the Senator from the 40th Senatorial District, which includes St. Lawrence as well as Clinton and Franklin Counties, represents an

area totalling 5,511 square miles (*Id.*), larger than the state of Connecticut. If a strict per capita standard were adopted in either house, it would necessitate one of two courses of events, neither of which is conducive to a representative democracy—either the Legislature would grow so large that effective discussion would come to a standstill, or the districts would grow so large as to make the legislator and his constituents virtually inaccessible to one another and to prevent a district from representing any significant community of interest among its voters.

All three of the major provisions of the apportionment formula here attacked are an attempt to satisfy the need for geographical distribution of legislators. Although the provision which most directly meets this is the one for enlarging the Senate, *cf. Matter of Fay*, 291 N. Y. 198, 208, 52 N. E. 2d 97, 99 (1943), the other provisions of course also tend in that direction by restricting the undiminished operation of a per capita standard and limiting the representation of the most populous areas.

To be sure, as appellee Nickerson points out (Br., pp. 41-43), there is no specific reference in New York's apportionment formula to area and, consequently, the formula has no fixed correlation between geographical considerations and other factors. But surely the Constitution does not require that such considerations be embodied in a formula of mathematical certainty. *Cf. Morey* v. *Doud*, 354 U. S. 457, 463-64 (1957). There can be no doubt from the history of the 1894 Convention that geography had become a vital issue. The delegates heard complaints that the area of senatorial districts had become so large that Senators could not properly represent the constituencies. 3 Revised Record of the Constitutional Convention of 1894, pp. 1210-11 (1900). And, in its address to the people, the Convention indicated that the enormous size of some of the districts was one of the most important elements in determining the provisions which emerged from its de-

liberations. 5 Revised Record, *op. cit. supra*, pp. 1253-54. Furthermore, the formula operates much as the delegates to the Convention foresaw that it would. By limiting the extent to which sparsely populated counties lose representation to their densely populated neighbors, the New York formula—particularly the provision for enlarging the Senate—meets the need to temper per capita representation with these geographical considerations.

Third, New York must take into account the unique concentration of population and political power in a few localities in order to assure that the wishes and needs of the rest of the State will not be ignored.

The "full ratio" rule in the Senate is designed to prevent the strangulation of the democratic process through a monopoly of political power, and the provision for adding increments in representation of a populous county to the total size of the Senate and for one Assemblyman per county also help to achieve that objective.

This situation is almost entirely peculiar to New York, which is one of only two states in which the central cities of a state's metropolitan areas can elect a majority of representatives to the legislature. United States Advisory Comm. on Intergovernmental Relations, Apportionment of State Legislatures (Report A-15), p. 44 (1962). The nine counties comprising one such metropolitan area—that which is made up of New York City and Nassau, Rockland, Suffolk and Westchester Counties (R. 75)—have 63.2% of the total citizen population of the State and a clear majority of both houses of the Legislature (R. 237, 239-40). New York City alone, because of its large population, is the focal point of any gubernatorial election. See Munger and Straetz, New York Politics, 39-40, 55-63; Note, 72 Yale L. J. 968, 1022 (1963).

It is a worthy part of our tradition to limit such concentration of political power. As the Solicitor General of

the United States has himself pointed out:

> "Constitutional statecraft often involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality in voting rights would be achieved if an entire State legislature were elected at large but the danger is too great that the remote and less populated sections would be neglected or that, in the event of a conflict between two parts of the State, the more populous region would elect the entire legislature and in its councils the minority would never be heard.
>
> "Due recognition of geographic and other minority interests is also a comprehensible reason for reducing the weight of votes in great cities. If seventy percent of a State's population lived in a single city and the remainder was scattered over wide county areas and small towns, it might be reasonable to give the city voters somewhat smaller representation than that to which they would be entitled by a strictly numerical apportionment in order to reduce the danger of total neglect of the needs and wishes of rural areas." Amicus Brief for the United States, *Baker* v. *Carr*, *supra*, pp. 29-30.

The Constitutional Convention, in its Address to the People, frankly noted its concern over this problem. It asked:

> "What will be the consequence of compelling the vast region from the city of New York to St. Lawrence and to Lake Erie, with its varied interests, sentiments and opinions not over well understood by the inhabitants of the city, to submit to such domination? Would such an arrangement conduce to the permanent welfare of the State?" 4 Revised Record, *op. cit.*, *supra*, p. 1255.

It noted, too, that "the advantage is still greatly on the side of the city as against the country districts on account

of their small territory, and the fact that all of the representatives stand for the entire city." *Ibid.*

Even if the dangers of political monopoly be ignored, it is still pertinent to inquire whether concentration of legislative representation in one area does not give that area power in the Legislature far beyond that which justly accrues to it even in terms of a per capita standard. As Elihu Root, a delegate to the Convention, remarked:

> "The question is whether thirty separate centers of 38,606 each scattered over the country are to be compared upon the basis of absolute numerical equality with one center of thirty times 38,606 in one city, with all the multiplications of power that comes from representing a single interest, standing together on all measures against a scattered and disunited representation from the thirty widely separated single centers of 38,606. Thirty men from one place, owing their allegiance to one political organization, representing the interest of one community, voting together, acting together solidly; why, they are worth double the scattered elements of power coming from hundreds of miles apart." 3 Revised Record, *op. cit., supra*, pp. 1214-15.

Effective democracy requires a pragmatic approach, not an all-or-nothing standard. The New York formula, particularly the "full ratio" provision, attempts to supply the necessary flexibility to meet the threat of undue concentration of power.

These three basic considerations have been met by the New York apportionment formula—which has been retained by the people of the State in their constitution since 1894. We believe it has given New York a government which is genuinely responsive to all interests, rural and urban, in the State. Seven decades of progressive government speak eloquently to that fact.

One of the most conspicuous indications of the success of the formula is that is has withstood the test of time. Under Article XIX, § 2 of the New York State Constitution, the people of the State must vote on the question "shall there be a convention to revise the Constitution and amend the same?"; this question is put before them every twentieth year and also at such other times as the Legislature may direct. If the people vote to hold such a convention, they choose delegates at the next ensuing general election who must meet in April following the election. If the convention proposes amendments, the people must be given an opportunity to vote on the proposals at an election to be held not less than six weeks after the adjournment of the convention. If adopted by the majority, the amendments become effective on the following January 1. The 1894 provisions here attacked were themselves adopted by a majority vote of the people of the State, pursuant to this provision. 1962-63 N. Y. Legis. Manual 320 (1962).

Since that time the people have repeatedly refused to alter the present State constitutional formula for apportioning members of the Legislature. In 1915 and 1938, they rejected proposals by their constitutional conventions to amend the apportionment formula. The 1915 proposals were rejected by a vote of 891,337 to 371,588, *id.* p. 323; the 1938 proposals were rejected by a vote of 1,425,344 to 848,367, *id.* p. 330. In 1916 and 1957, the people of the State of New York voted against holding a constitutional convention; the 1916 vote was 658,269 to 506,563, *id.* p. 323; in 1957 the convention was rejected by a vote of 1,368,063 to 1,242,568, *id.* p. 340. The 1957 rejection of a constitutional convention deserves particular emphasis because Governor Harriman had urged that the people vote for a convention to revise the appointment formula. He stated that the most urgent constitutional reform needed was "to elect one house of the legislature on the basis of population to give big cities fuller representation." New

York Times, Sept. 7, 1957, p. 1, col. 8. See *id.*, Sept. 24, 1957, p. 29, col. 1; Octo. 29, 1957, p. 22, col. 5. Despite his position, the voters rejected a convention.

The 1957 election and its predecessor elections show clearly that appellants could not rely even on an oversimplified majoritorian theory to sustain their complaint. The essence of that complaint is that urban residents are underrepresented in the Legislature, and therefore are unable to assert their political power in the councils of the State. Yet, even if the majority were suppressed in the the Legislature—and we shall demonstrate that it is not—it was hardly suppressed in the 1957 election. According to the 1960 census, the six counties represented by the six individual plaintiffs had a citizen population of 9,129,780, or 56.2% of the total State population (R. 227-28, 234). The "full ratio" counties—portrayed by appellants as the arch-victims of discrimination—had a clear majority of the citizen population of the State (Pl. Exh. 4, R. 180, 246), and appellants themselves admit that if these counties were able to elect the state-wide delegates, they could have controlled any constitutional convention in 1957 (Br., p. 71).

This is not to say that there were not other issues at stake in past votes respecting constitutional conventions or even constitutional amendments. It does point up, however, that it has always been open to the citizens of the State to change this formula. Power remains where it belongs, with the people—and they have been content with their representation in the legislative process.

3. *Even if the Constitution required substantial adherence to per capita representation, the New York formula would satisfy such a test.*

Up to this point, we have indicated our view that sole adherence to a per capita standard is not necessarily a desirable basis upon which to structure a state legislature, and we have tried to show that New York justifiably places

some reliance on factors other than per capita representation. The most striking fact about the New York apportionment, however, is not that it takes into account these other factors—virtually all the states do so—but that it adheres more strictly to a per capita standard than do three-fourths or more of the other states of the Union.

New York ranks twelfth among the states in its degree of conformity to per capita representation. David and Eisenberg, Devaluation of the Urban and Suburban Vote 5 (1961). In contrast with some states which depart radically from the per capita standard, New York structures its legislature so that constituencies which make up a majority of the legislature must contain, in the Senate, at least 36.9% of State's population and, in the Assembly, at least 38.2% of the population. National Municipal League, Compendium on Legislative Apportionment, p. iii (2d ed. 1962). Of the other three states whose apportionments are now before this Court for review, Virginia ranks second in the nation in adherence to the per capita standard, with theoretical majorities in each house of its legislature made up respectively of 37.7% and 36.8% of the population; Alabama ranks 39th with theoretical majorities in each house of 25.1% and 25.7%; and Maryland ranks 44th, with theoretical majorities of 14.2% and 25.3%, respectively. David and Eisenberg, *op cit. supra*, p. 5; National Municipal League, *op. cit. supra*, pp. iii-iv.

In light of the requirements of New York's apportionment formula, it is hardly surprising to find that it comes so close to per capita representation. Indeed, the widest disparities in per capita representation among the counties occur in the Assembly (R. 236), and are traceable to the minimal guarantee of one Assemblyman per county—the same guarantee as is given to each state in the House of Representatives. U. S. Const. Art. I, § 2. The disparities in the Senate are much narrower (R. 234) and arise out of the provisions for apportioning only on a full ratio and enlarging the total size of the chamber.

Despite these facts, those who challenge the present system have harped on the numerical disparities which inevitably occur in any system which is not entirely pegged on per capita representation, and they have cited a proliferation of extreme cases of "overrepresented" and "underrepresented" districts. We do not believe that these statistical configurations can withstand analysis. Even advocates of a per capita standard have pointed out that measures of extreme cases can hardly be the test of an apportionment. See David and Eisenberg, Devaluation of the Urban & Suburban Vote 3 (1961). Neither is it pertinent to dwell, as do appellants (Br., p. 35), on the extent to which the small counties are "overrepresented", for the figures produced are only misleading. Because the total representation for these counties is very small, any increased representation given to them looms large as a percentage figure but has little effect on the representation of the larger counties. For example, although the five least populous counties of New York—on a per capita basis—now have a voting power which is 848 per cent of the State average, the most populous counties' voting power is 86 per cent of the State average. *Id.* at 50. If instead of relying on extremes one looks at the overall figures, it is difficult to see how New York could come closer to a per capita basis without disregarding other factors which are needed to insure fair representation to all voters in the State.

As we already have pointed out, the population figures themselves conclusively refute the central allegation of appellants' complaint—that New York's formula results in a "grossly unfair weighting" in favor of "the lesser populated rural areas" and "to the great disadvantage of the densely populated urban centers of the state" (R. 6). According to the 1960 census, the six counties represented by the six individual plaintiffs had a citizen population of 9,129,780, or 56.2% of the total citizen population of the State (R. 227-28, 234). They were represented by 72 Assemblymen and 28 Senators—48.0% of the Assembly and

48.3% of the Senate (R. 227-29). If the Legislature reapportions the State on the basis of the 1960 census figures, these same counties will have 26 Senate seats and 69 Assembly seats, 45.6% and 46.0%, respectively, of the two houses (R. 234, 237). The ten most heavily populated counties in the State (Kings, Queens, New York, Bronx, Nassau, Erie, Westchester, Suffolk, Monroe and Onondaga) have, under the current apportionment, 38 Senate seats, 65.5% of all the Senate, and 93 Assembly seats, 62.0% of all the Assembly (R. 227-29); when the Legislature reapportions New York on the basis of the 1960 census figures, these same counties will have 37 Senate seats and 92 Assembly seats, 64.9% and 61.3%, respectively, of the two houses (R. 234, 237). They have a citizen population of 11,937,406—73.5% of the total citizen population of the State (R. 234). Each of these counties is at least 72% urban, and most are over 90% urban (R. 61).* Each is in a metropolitan area. Munger and Straetz, New York Politics 46 (1960).

In a further effort to disparage the close relation which the present formula bears to per capita representation, appellants (Br., p. 36) and the New York City officials aligned with them (Br., p. 15) have set forth voting figures which show, they claim, that the party composition of the Legislature does not adequate reflect the number of votes case for candidates of the democratic party. Even if this contention could conceivably be related to the merits of their position, we believe it is not supported by the figures

---

* Appellants object (Br., pp. 31-32) to any comparison based upon the ten largest counties, since they are not all "underrepresented". They insist that any meaningful comparison must be between the "full ratio" counties and the rest of the State. Thus, they have apparently abandoned their claim that the New York constitution reflects any rural-urban bias, and rest solely upon an assertion that each county must be accorded representation on a per capita standard. In any event, the "full ratio" counties are adequately represented. In the projected apportionment, they have 26 Senators, or 45.6% of the Senate, with 9,519,316 total citizen population, 58.6% of the total for the State (R. 234).

they present. First of all, it is a matter of judgment whether one political party or another is adequately represented in a legislature; one commentator, for example, has concluded that the present apportionment does an excellent job along that line. See Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law. 367, 382 n. 82 (1963). Second, the figures contained in appellants' and the City's briefs completely misconstrue the functions of a single-member district system. They assume that such a system should reflect the total party vote in the state in the same way as would, say, a system of proportional representation. That view is, of course, wholly erroneous. A single-member district system reflects the wishes of a majority of the voters in each district; it does not attempt to mirror the whole. Accordingly, we have corrected appellants' and the City's figures in accordance with the assumptions of a single-member district system. That is, we have counted each vote in a Senate district electing a Republican as a "Republican" vote, and each vote in a Senate district electing a Democrat as a "Democratic" vote. The figures for the past five legislative elections follow:*

Year	*Total Vote Rep. Dists.*	*Total Vote All Dists.*	*Rep. Pct.*	*Rep. Sens.*	*Total Sens.*	*Rep. Pct.*
1954	3,023,014	5,241,393	57.7%	34	58	58.7%
1956	4,701,959	7,188,138	65.4%	38	58	65.5%
1958	3,516,775	5,842,507	60.2%	34	58	58.7%
1960	3,962,830	7,019,368	56.5%	33	58	56.9%
1962	3,384,566	5,921,501	57.2%	33	58	56.9%

These figures certainly demonstrate that, contrary to appellants' charges, the apportionment formula adequately reflects the party vote.

---

* Sources: For 1954: 1956 N. Y. Legis. Man. 1071-80
For 1956: 1957 N. Y. Legis. Man. 1074-85
For 1958: 1959 N. Y. Legis. Man. 1093-1103
For 1960: 1961-62 N. Y. Legis. Man. 1112-23
For 1962: 1962-63 N. Y. Legis. Man. 1168-79

In sum, the discrepancies even between a sole per capita standard and the present New York formula are minimal. Unless strict adherence to per capita representation alone is mandated by the Fourteenth Amendment—a conclusion which would ignore many other vital ingredients of "equality"—we do not believe that any fault can be found with the New York system's provisions for popular representation.

4. *The New York formula does not result in any arbitrary distinction or invidious discrimination.*

Although the Solicitor General of the United States has admitted, with commendable candor, that New York's apportionment rules cannot be described as a "crazy quilt" (Br., p. 11)*, appellants and the City, in an attempt to analogize this case to *Baker* v. *Carr*, 369 U. S. 186 (1962), nevertheless argue that New York's formula cannot satisfy even a test of minimum rationality. For the most part, these arguments merely echo those which would have the per capita standard preempt the field of apportionment. Insofar as these arguments raise new material, we shall address ourselves to them here.

One of these arguments, however, merits particular attention because it constitutes a complete turnabout from the theory of appellants' complaint. The City maintains (Br., p. 62-66) that the Senate apportionment is irrational because it does not show any consistent bias against urban in favor of rural counties, but merely restricts the per capita representation of the more populous counties. Obviously, there is nothing in the Constitution which mandates a State to impose a per capita standard for all save "rural" counties—the point is without substance. It is in-

---

* The Solicitor General expressly refrained from considering the rules for districting—as opposed to apportionment. We shall consider these rules, together with the apportionment provisions in this section—and demonstrate that they are perfectly constitutional.

teresting, nevertheless, because the central theory of the complaint in the instant case is that the apportionment invidiously discriminates rural counties against in favor of urban counties. Not only has the City turned its back on this theory, but appellants themselves apparently have abandoned it. As we have noted, they now reverse themselves to argue (Br., pp. 31-32) that comparisons based upon the urban or rural character of an area are irrelevant to the theory of their complaint. Thus, it appears that they rest exclusively upon the theory that the per capita standard is preemptive. Indeed, they must do so; as the City's brief points out (pp. 62-66), there is in fact no pattern of discrimination against rural areas.

Appellants (Br., p. 38) and the City (Br., pp. 58-60) also argue that the rules for districting the Assembly—as well as the apportionment rules—result in a "crazy quilt". In particular, they attack Art. III, § 5, par. 4 of the New York constitution, which in delegating to local authorities the power to draw Assembly lines in a multi-district county, provides that each Assembly district must be wholly contained within one Senate district. Where a county has two Senate districts and three Assembly districts, this provision results in one Senate district containing two Assembly districts while the other Senate district contains only one Assembly district. The constitutionality of this districting rule is not raised by the pleadings or by the record, and is therefore not properly before the Court. In any event, the point is insubstantial. The provision requiring Assembly districts to be contained within Senate districts is necessary for at least two reasons. It curbs gerrymandering of Assembly districts by local authorities, and thus assures that Assembly districts will be drawn along lines which will reflect appropriate groupings for representation rather than local partisan advantage. See United States Advisory Comm. on Intergovernmental Relations, Apportionment of State Legislature (Report A-15), pp. 54-55 (1962). It also coordi-

nates the constituencies of the Senator and Assemblyman. Thus, a Senator and an Assemblyman in his district are able to work together more effectively for common purposes. There is no justification at all for labelling this provision as arbitrary.

All the remaining sorties into the "crazy quilt" area simply reflect earlier arguments. For example, the City argues (a) (Br., pp. 57-58) that it is irrational to give a second Assemblyman to counties having over 1½ times the "ratio" because there are other counties, with almost as many inhabitants, which do not get a second Assemblyman. The short answer is that there must be a dividing line drawn at some point—one can always argue about where to draw the line, but one can hardly turn constitutionality on such an argument. And, if further explanation be needed, the provision giving a second Assemblyman to counties having over 1½ times the "ratio" allows a fairly populous county—with not quite two ratios—to gain greater representation than the very sparsely populated counties which have one Assemblyman but which may fall far short of achieving a full ratio. In the same scatter-shot attempt to find arbitrariness where there is none, the City argues (b) (Br., pp. 60-61) that it is "inconsistent" with the guarantee of one Assemblyman per county to combine Hamilton and Fulton counties in one Assembly district. The point is without merit. Hamilton is by far the least populous county in the State (R. 228) and Fulton happens to be a neighboring county (R. 317). There is certainly nothing strange about this reasonable exception to the general rule. In a similar vein, the City argues (Br., pp. 66-72) that the Senate apportionment is arbitrary because the provision for increasing the size of the Senate measures increases from the year 1894, the year the formula was passed, whereas "there is nothing sacred about the year 1894", and because the provision for a "full ratio" prevents some counties—having nearly a full ratio" —from gaining an additional Senator. Again it is clear

that a line needs to be drawn and that, wherever there is a provision for increasing the size of a body, there must be some point from which it is measured. A line or a base year need not be "sacred" to be acceptable. These arguments only show the weakness of any attempt to impute arbitrariness to the apportionment formula.

The New York constitution is, in fact, anything but arbitrary. It has established a systematic plan for apportioning legislative seats, giving a heavy emphasis to per capita representation while tempering this standard with other features to achieve adequate representation throughout the State. It avoids the error of equating mathematical niceties with true equality and as such is in the highest traditions of the federal Constitution.

POINT II

This case presents no occasion for the intervention of federal equity power.

In their complaint, appellants sought declaratory and injunctive relief, and further requested that the District Court retain jurisdiction of the action until the State legislature, "freed from the fetters imposed by the Constitutional provisions invalidated by this Court, provides for such apportionment of the State legislature as will insure to the urban voters of New York State the rights guaranteed them by the Constitution of the United States" (R. 12).

We believe that the relief sought by appellants is hopelessly vague, and points up the impossible task which would face a court of equity in enforcing their elusive theories of "equality." The obstacles confronting the Court are no less insuperable merely because of the fact that the immediate relief requested is a declaration of unconstitutionality, rather than a specific decree substituting another apportionment system for that adopted by the

people of the State of New York. First, an equity Court must apply some touchstone of constitutional theory when it comes to review any Act which would be passed to replace one declared unconstitutional. Second, in the event that the Legislature is unable to redistrict the state in conformity with a judicial decree, the Court must be prepared to grant specific relief. It is no part of equity's function to exercise jurisdiction "in the hope that such a declaration as is made today may have the direct effect of bringing on legislative action and relieving the courts of the problem of fashioning relief." *Baker* v. *Carr*, 369 U. S. 186, 251, 260 (1962) (CLARK, J., concurring). Unless a declaration of unconstitutionality here could be supported by an effective decree, the only proper course would be to dismiss the complaint.

It is to this problem—the impropriety of the relief sought—that we now turn. In this section of our brief, we will discuss two factors which, in our view, make it inequitable to grant relief here. First, as we have indicated, we believe there are no viable standards by which a Court could implement a decree. Second, we believe that in light of the grave consequences of any such decree, and the tenuous nature of any concept of "equality" embodied in it, a plaintiff must show compelling circumstances to justify the intervention of federal equity power to remake the structure of a state legislature. Even assuming that a workable decree could somehow be drafted, we will demonstrate that in New York State, whose legislative structure is responsive to the popular will and whose total governmental process is calculated to be responsive to the needs of a wide variety of popular interests, there are no compelling circumstances to justify such an intervention.

A. The lack of standards for a Court-imposed formula.

We already have touched on the insurmountable problems which would face a Court if it set out to enforce a

requirement that one or both houses of a state legislature must be apportioned in such a way that the dominant standard is per capita representation. These problems, of course, also prevent a court from formulating a decree which would embody appellants' elusive theories of "equality", and yet be sufficiently specific to permit ready compliance on the part of a state legislature.

First, there is no sure guide to how much weight must be placed on per capita representation. Even its staunchest advocates agree that reasonable deviations from that standard must be allowed to accommodate natural geographic boundaries, long standing community borders and similar dividing lines. Significantly, however, they fail to indicate how much deviation from a per capita standard is to be tolerated—and their own arguments show that the standard is a dubious and uncertain one at best. For example, the Solicitor General has referred to the projected 1960 apportionment of the New York Senate, in which a majority of the senators could be elected by constituencies containing 38 percent of the population, as one resulting "in gross inequalities in the representation of voters" and giving "control of the legislature to a relatively small minority of the People" (Br., pp. 35-36). Almost in the same breath, he refers to the 1906 apportionment of the Senate in which 41 percent of the voters lived in constituencies capable of electing a majority of the Senate, as one in which "the deviation in the Senate was comparatively small" (Br., p. 37). The problem of ascertaining the precise degree of per capita representation which is required becomes even more acute, of course, when it is conceded—as we believe it must be—that it is desirable to temper any standard of per capita representation with at least a modest weight for other factors which traditionally have been thought necessary to guarantee each voter an equal opportunity to influence the legislative process. It is beyond any possible standard of principled adjudication

to determine the extent to which these other factors may be included in an apportionment.

A similar problem of lack of standards haunts the suggestion, which we already have discussed, that only one house of a bicameral legislature may be apportioned on a basis which deviates substantially from a per-capita standard. As we have noted, it makes no sense to determine that what is a rational basis for apportionment in one chamber becomes irrational when applied to the other chamber. We wish to note here, however, that the same problems which make such a view untenable as an interpretation of the Fourteenth Amendment also render it useless as a standard for a workable equity decree. The representation of both houses of a state legislature is a closely intermeshed affair. It may be that it is possible to forego certain factors in apportioning one house if the inclusion of such factors in the apportionment of the other chamber sufficiently meets the needs of the entire legislative process. On the other hand, it may be that such factors would be better included in both houses to meet that need. For example, appellants themselves have correctly noted that it would be impossible in New York State to make an intelligent choice between the Senate and the Assembly as the chamber to be invalidated in a judicial decree requiring its reapportionment on a strict per capita basis (Br., pp. 49-50). They argue that this close relationship between the two makes it necessary to invalidate the apportionment of both legislative chambers even if this Court should find that one of them has an apportionment which is consistent with the Fourteenth Amendment. There is, of course, no merit to this suggestion. But it does present a larger question—whether the Court should strike down a legislative apportionment system which is delicately intermeshed with other parts of the governmental process. For surely it is true that the apportionment of one chamber of the Legislature not only is intimately tied to that of the other, but also to the executive branch of

the State and to its entire political structure. To tamper with this complex interrelationship, in the name of some abstruse concept of per capita representation, may indeed be to impose a cure which would "be worse than the disease." *Colegrove* v. *Green*, 328 U. S. 549, 564, 565 (1946) (RUTLEDGE, J., concurring).

The problem as it arises here is even more acute than it is in the ordinary task involving the exercise of a court's equitable discretion. No one can seriously contend that it is desirable for a court, in the first instance, to take on itself the burden of apportioning a state legislature. We urge, therefore, that it is particularly appropriate that any decision in this area lay down clear standards to enable a legislature to know the commands of the Constitution and guide itself accordingly. A decree which speaks in vague terms of adherence to a per capita standard—plus some allowable deviation to include other factors—does not satisfy this need. If such a decree results in forcing a state legislature to adhere to a strict per capita standard because it is unable to discern the vague "deviations" which it may be allowed to pursue, that decree would actually set back the cause of equal access to state government. It would prevent the legislature from giving due consideration to factors, other than the per capita standard, which may be required to insure such equal access. If, on the other hand, such a decree results in a legislative apportionment thereafter determined to give "undue" weight to factors other than per capita representation—and this new apportionment is therefore struck down—it has left the politics of the state in a hopeless tangle.

A decree which enforces adherence to the requirements of the state's own constitution or to "well developed and familiar" judicial standards under the Fourteenth Amendment, *cf. Baker* v. *Carr*, 369 U. S. 186, 226 (1962), would be open to no such objections. It alone can advance the cause of responsible state government. Any other decree can only retard it.

B. The lack of compelling circumstances to justify a Court-imposed formula.

Even if a court were to undertake—in the face of all the difficulties we have mentioned—to decree substantive standards for an apportionment in excess of those provided by the state's own constitution, it is quite obvious that it should do so only in the most "compelling circumstances." *Colegrove* v. *Green*, 328 U. S. 549, 564, 565, 566 n. 6, (1946) (RUTLEDGE, J., concurring). And assuming appellants in this case could somehow succeed in raising a colorable issue under the constitution, it is difficult to perceive how they could hope to show the kind of drastic situation which demands intervention by a federal equity court.

First, as we have pointed out, New York adheres substantially to a per capita standard in both houses of its legislature. Even under such a standard, it ranks twelfth in the nation in the degree of "representativeness" of its legislature. David and Eisenberg, Devaluation of the Urban and Suburban Vote 5 (1961). The voters in those counties with a population of more than 500,000 persons—with practical opportunities for asserting their political weight far in excess of those of other voters—are grouped together in constituencies having 86 per cent of the representation (on a per capita basis) accorded the average county in the State. David and Eisenberg, *id.* at 50. By contrast, Alabama and Maryland rank 39th and 44th, respectively, on the scale of representation according to a per capita standard, *id.* at 5, and their most "underrepresented" counties have only 25 per cent and 37 per cent, respectively, of the average representation in the State, *id.* at 19, 38. Even Virginia, which ranks second in per capita representativeness among all the states, *id.* at 5, gives its most populous counties only 73 per cent of the representation accorded the average county in the State. If a case of "compelling circumstances" can be made out in New York, there is no reason why it cannot be made out in virtually every other state of the union.

Second, New York's urban counties—which plaintiffs claim are dominated under the current apportionment by their less populated "rural" neighbors—have a clear majority of the state legislature. As we have pointed out, the ten most heavily populated counties alone—each of them at least 72 per cent urban, and most over 90 per cent urban (R. 61)—contain 73.5 per cent of the total citizen population and control 65.5 per cent of all the Senate and 62.0 per cent of all the Assembly (R. 227-29); on the basis of 1960 census figures, these counties will control 64.9 per cent and 61.3 per cent, respectively, of the two houses (R. 234, 237). In fact, the nine counties comprising the New York City standard metropolitan statistical area (R. 75) themselves have a majority of both legislative houses in both the current (R. 227) and projected (R. 237, 239-40) apportionments.

Third, the citizens of the most populous counties have had ample opportunity to change the present apportionment system. We have already alluded to the 1957 vote rejecting the constitutional convention, at which appellants admit (Br., p. 71) that the five "full ratio" counties—appellants' favorite characterization of the most populous counties in the State—would command a majority of the total delegation. It would surely be anomalous to conclude that federal equity power should intervene to protect those who have a clear opportunity to protect themselves.

Fourth, we reiterate again that the New York Legislature faithfully followed the dictates of its own constitution and has never attempted to discriminate against any class of voters on any basis whatsoever. The provisions of the New York constitution attempt to deal equally with all voters by recognizing that many factors other than per capita representation determine the strength of their voice in the legislative process.

Finally, we wish to add one further observation which we believe relevant to the question of whether a federal court should exercise its equitable powers to upset the

New York apportionment formula. The apportionment of a legislature is but one small facet of the governing process. As we have noted before, the stark fact which emerges from a glance at the population figures of this State is that New York City and its metropolitan area alone have the power to dominate the State. The Governor of the State traditionally must depend upon the residents of New York City for a substantial vote in order to hope to win an election. Munger and Straetz, New York Politics 55-63 (1960); Note, 72 Yale L. J. 968, 1022 (1963). Moreover, New York City, by sheer virtue of its size, wields an institutional power in the State that cannot be measured solely in terms of its representation in the Legislature or even in terms of its influence on state-wide elections. *Id.* at 1026. The same is true, although to a lesser degree, for Erie County—the only "full ratio" county which is not part of the New York City metropolitan area (R. 234). As we have already pointed out, New York City and its metropolitan counties control the Legislature. Indeed, New York State as a whole shows a relatively small variation from a standard of per capita representation. If one seeks for "compelling circumstances" to justify the imposition of a Court-decreed apportionment formula in this State, it is only natural that one look not only to the Legislature but to the governmental process in its entirety to see whether or not it denies responsiveness to any portion of the electorate. See *id.* at 1020. Under the circumstances of this case, we maintain that there can be no such showing.

POINT III

The District Court properly rejected appellants' offers of proof.

In this last section of our brief, we shall deal with appellants' contention that the District Court erroneously rejected their offers of proof. In their notice of appeal, appellants indicated that they would argue that the Dis-

trict Court wrongfully excluded evidence in three areas. First, appellants had offered to prove that the 1894 constitutional convention "intended to discriminate against urban residents because they were believed to be unworthy of an equal voice in the State government." Second, appellants offered to prove that "the malapportioned legislature unfairly discriminates against the underrepresented urban residents." Finally, appellants offered to prove that "a consensus of expert opinion supports the view that an apportionment pursuant to which both houses of the Legislature are grossly disportionate to population is unfair and discriminatory" (R. 327). We shall touch on all three of these areas briefly, although it appears from appellants' brief that they do not press the third point.

A. The offer to prove "intentional" discrimination.

Appellants first offered to show that each rule limiting the representation of New York City was "intentionally devised" to do that (R. 143). The Court rejected this offer on the ground that the motivation of the constitutional convention was irrelevant (R. 145).

We believe that the District Court quite properly rejected this offer of proof. Apparently, appellants intended to show that the delegates to the 1894 convention passed the constitutional provisions here challenged because they believed the urban voters were "unworthy of an equal voice in the State government" (R. 327). However, it is well established that such proof is utterly incompetent. It is alien to constitutional doctrine to inquire into the frame of mind of the convention or any of its members; the only question for the Courts is their power to pass these provisions, not the private beliefs which impelled them to do so. *United States* v. *DesMoines Ry.*, 143 U. S. 510, 544 (1892). This unsupported foray into legislative motive—attempting to taint the convention with a kind of legislative *mens rea*—imagines a "motive" for a large deliberative

body; and that imagination is completely without support in law or reality. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs*, 330 U. S. 552 (1947). In fact, appellants' references to the intemperate remarks of a few delegates to the convention hardly reflect that body's dominant mood. As one student of the proceedings has aptly pointed out, most of the delegates to the convention spent their time discussing far more weighty matters than the supposed "inferiority" of residents of any particular area of the State. See DeGrazia, Essay on Apportionment and Representative Government 40-49 (1963). Those of the delegates who did find the time to engage in this fruitless debate managed to say much more that was favorable about the urban populations than was unfavorable. *Id.* at 99.

Although appellants attempt to circumvent the well established bar to inquiry into legislative motive by relying on cases such as *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala.), *aff'd* 336 U. S. 933 (1949), there is no basis whatever for the analogy. In *Davis*, it was relevant to consider the legislative setting of a literacy test requirement in order to determine whether it was used as a device to evade constitutional prohibitions against racial discrimination. See *Lassiter* v. *Northampton Co. Bd. of Elections*, 360 U. S. 45, 59 (1959). In the instant case, there is no question whether the New York apportionment formula is a "device" to "evade" a strict per capita standard. Obviously, the formula tempers such a standard with other factors, and the only question before the Court is the constitutional validity of the use of these factors. Appellants' offer was both incompetent and irrelevant, and it properly was excluded.

B. The offer to prove that the Legislature has "discriminated" against urban areas.

Appellants also offered to show that the Legislature, as a result of its claimed pro-rural bias, has discriminated against the urban areas in imposing taxes and distributing

revenues (R. 142, 147). This offer, too, was excluded (R. 148).

Here, too, the District Court ruled properly. One need not attack the history of state legislation in order to establish his standing to assert a claim of invidiously discriminatory legislative apportionment. *Baker* v. *Carr, supra,* held that citizens have a "plain, direct, and adequate interest in maintaining the effectiveness of their votes." 369 U. S. at 208. See *United States* v. *Classic,* 313 U. S. 299 (1941); *United States* v. *Saylor,* 322 U. S. 385 (1944).

Moreover, it adds nothing to appellants' case to launch a wholesale attack on the wisdom of past legislation. It has long been established that the Constitution does not regulate the allocations of taxes or revenues among a state's subdivisions. *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 372 (1926); *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 521-23 (1937); *Everson* v. *Board of Education,* 330 U. S. 1, 5-8 (1947). Such an allocation is purely a political question to be thrashed out in the Legislature, not the Courts. *Davis* v. *Synhorst,* 217 F. Supp. 492 (S. D. Iowa 1963). Obviously, much may be said pro and con about the "wisdom" of New York's allocation of its taxes and revenues; in fact, some have concluded that the Legislature shows undue favoritism to the urban populations in this respect. See De Grazia, Essay on Apportionment and Representative Government, 118 n. 10 (1963). If a legislature passes an unconstitutional act, one need not claim malapportionment in order to strike down the act; on the other hand, if the legislature acts constitutionally, one cannot show malapportionment by asserting his grievances at the legislature's actions. Appellants' reliance on footnote 15 of the *Baker* decision is somewhat tenuous; if anything, the Court there indicated grave doubt as to whether the taxation arguments "could add anything however presented," and it left the question open only because it did not have to reach it. *Baker* v. *Carr, supra,* 369 U. S. at 195.

There is, of course, no merit to appellee Nickerson's suggestion (Br., pp. 18-19) that the allegations of the complaint regarding this alleged "discrimination" must be taken as true "since appellants were denied the right to prove the contention." That standard would apply only if the complaint had been dismissed for legal insufficiency without a hearing on the merits. *Cf. Clark* v. *Uebersee Finanz-Korp*, 332 U. S. 480, 482 (1947). A litigant who makes an offer of proof which has been excluded is a long way from proving the truth of the matter asserted; at most, he can gain the opportunity on a new trial to introduce such evidence.

C. The offer to prove that most "experts" agree with appellants' legal theories.

Appellants also offered in the District Court hearing to produce "expert" testimony as to whether the present apportionment was "fair and equitable" (R. 129). The Court rejected the offer (R. 129). Although appellants, in their notice of appeal, assign the rejection of this proffered evidence as error (R. 327), they do not press this point in their brief on appeal but merely mention it in passing (Br., p. 32 n. 19). We discuss the point here only to indicate that it is utterly without merit.

Obviously, the question of whether an apportionment formula is consistent with the Fourteenth Amendment is one for the Courts; they alone are experts on constitutional law. There is no more reason why an "expert" should be allowed to testify as to the validity of an apportionment formula than there is to have an "expert" testify as to the validity of any other state statute challenged as repugnant to the Federal Constitution.

It is interesting to note, however, that the "consensus of expert opinion" (R. 327) claimed by appellants to support their view simply does not exist. In fact, if one could divine any discernible trend from the many comments which followed this Court's decision in *Baker* v. *Carr*, *supra*, one would see that the "experts" have warned—

with good reason—that any mandate to follow a strict per capita standard in the apportionment of seats in the state legislature would result in a setback for the cause of viable, responsive state government. See *e.g.*, Bickel, *Reapportionment and Liberal Myths*, 6 Commentary 483 (1963); De Grazia, Essay on Apportionment and Representative Government (1963); Dixon, *Apportionment Standards and Judicial Power*, 38 Notre Dame Law. 367 (1963); Israel, *On Charting a Course Through the Mathematical Quagmire*, 61 Mich. L. Rev. 107 (1962); Lucas, *Legislative Apportionment and Representative Government*, 61 Mich. L. Rev. 711 (1963); McCloskey, *Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54 (1962); Neal, *Baker* v. *Carr; Politics In Search of Law*, 1962 Sup. Ct. Rev. 252 (1962); Sindler, *Baker* v. *Carr: How to 'Sear the Conscience' of Legislators*, 72 Yale L. J. 23 (1962).

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the Southern District of New York dismissing the complaint should be affirmed.

Dated: New York, New York, October 18, 1963.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney pro se and for
Defendant-Appellee
Secretary of State

Irving Galt
Assistant Solicitor General

Sheldon Raab
Assistant Attorney General

Barry Mahoney
Deputy Assistant Attorney General
of Counsel.